

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 248

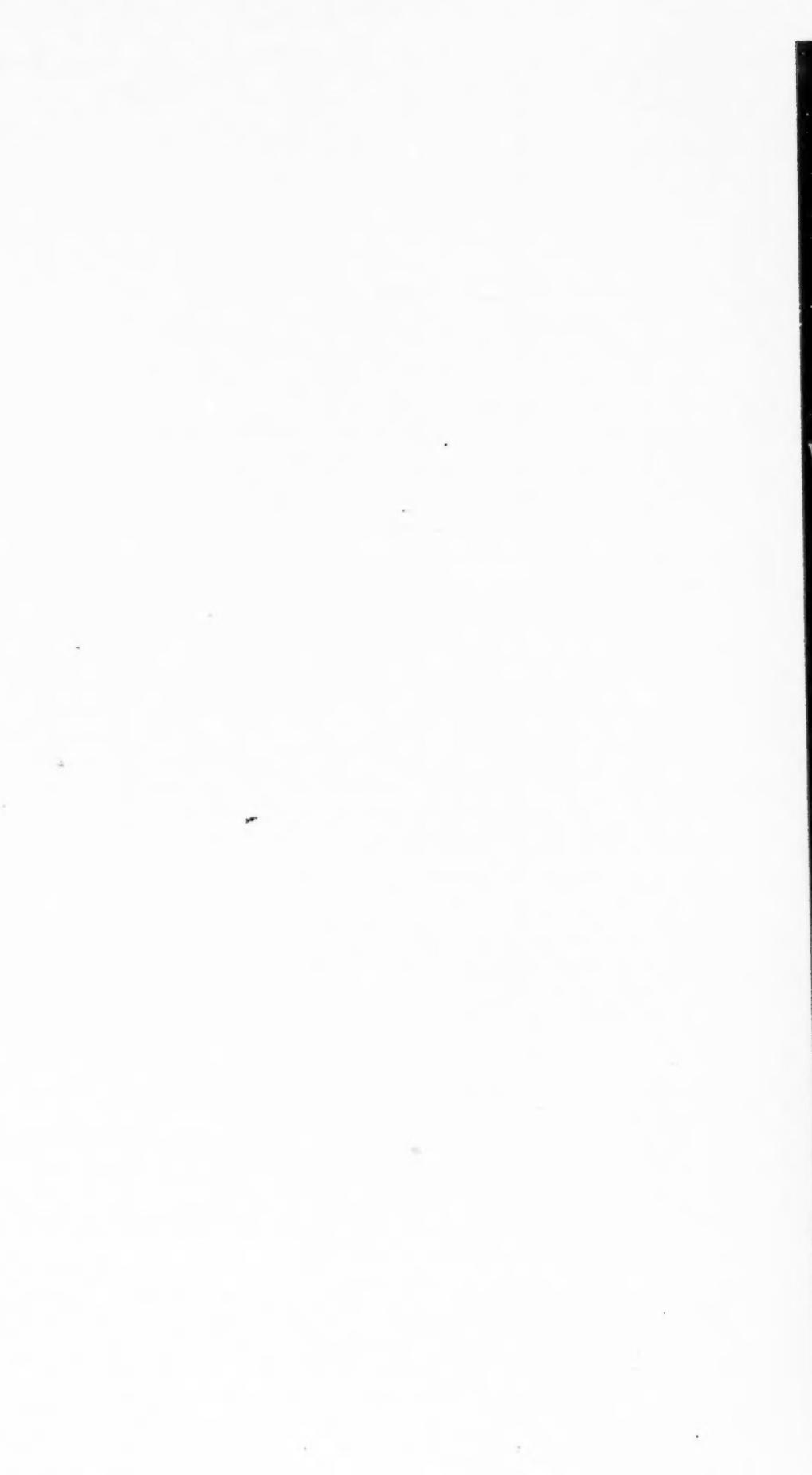
**GUY E. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER**

vs.

LERNER STORES CORPORATION (MD.)

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT**

**PETITION FOR CERTIORARI FILED JULY 8, 1941
CERTIORARI GRANTED OCTOBER 13, 1941**



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REVENUE, PETITIONER
vs.
LERNER STORES CORPORATION (MD.)

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Before United States Board of Tax Appeals

Docket No. 99493

LERNER STORES CORPORATION (Md.), PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

Appearances: For Petitioner: Andrew B. Trudgian, Esq. For Respondent: H. D. Thomas, Esq.

1939

July 11—Petition received and filed. Taxpayer notified. (Fee paid.)

July 11—Copy of petition served on general counsel.

July 28—Answer filed by general counsel.

July 28—Request for hearing in New York filed by general counsel.

Aug. 4—Notice issued placing proceeding on New York calendar—answer and request served.

1940

Apr. 4—Hearing set May 13, 1940, in New York City.

May 13—Hearing had before Mr. Leech on merits—submitted. Briefs due June 27, 1940—replies July 12, 1940.

May 23—Transcript of hearing 5/13/40 filed.

June 25—Motion for extension to July 6, 1940, to file brief filed by General Counsel. 6/27/40 granted as to both parties.

2 June 28—Brief filed by taxpayer. 7/5/40 copy served.

July 5—Brief filed by general counsel.

July 20—Reply brief filed by taxpayer.

Sept. 20—Memorandum findings of fact and opinion rendered—J. Russell Leech, Division 6. Decision will be entered for respondent.

Sept. 20—Decision entered—J. Russell Leech, Division 6.

Oct. 24—Stipulation of venue filed.

Oct. 24—Petition for review by U. S. Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.

Oct. 24—Proof of service filed by taxpayer.

1940-

Nov. 6—Agreed praecipe for record filed with proof of service thereon.

Nov. 6—Notice of filing praecipe for record filed with proof of service thereon.

Before United States Board of Tax Appeals

Petition

Filed July 11, 1939

The above-named petitioner hereby petitions for a redetermination of the deficiency in excess-profits taxes set forth by the Commissioner of Internal Revenue in his notice of deficiency dated May 18, 1939, and as a basis of its proceeding, alleges as follows:

I

The petitioner is a corporation organized under the laws of the State of Maryland, with its principal office at 354 Fourth Avenue, New York, N. Y.

3

II

The notice of deficiency (a copy of which is attached and marked Exhibit A and made a part hereof), purports to have been mailed to the petitioner on May 18, 1939.

III

The taxes in controversy are excess-profits taxes in the amount of \$27,947.38 for the fiscal year ended January 31, 1937. Petitioner's return of income and excess-profits tax for the fiscal year ended January 31, 1937, was duly filed in the office of the Collector of Internal Revenue for the Third District of New York.

IV

The determination of excess-profits taxes set forth in the said notice of deficiency is based upon the following errors:

(a) In determining the net income, of the petitioner, subject to excess-profits tax for the fiscal year ended January 31, 1937, the Commissioner of Internal Revenue has erroneously failed or refused to allow as a deduction, therefrom, ten per cent of \$2,500,000.00, the corrected declared value of petitioner's capital stock as of June 30, 1936.

(b) The Commissioner has illegally and erroneously determined a deficiency in excess-profits taxes as due by petitioner for

the fiscal year ended January 31, 1937, under Section 106 of the Revenue Act of 1935, as amended by Section 402 of the Revenue Act of 1936, although these sections of law and the excess-profits tax imposed thereunder are invalid and unconstitutional under the Constitution of The United States of America.

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V

The facts upon which the petitioner relies as the basis of this proceeding are as follows:

With respect to IV (a) :

(a) In connection with the preparation of your petitioner's capital stock tax return for the capital stock tax year ending June 30, 1936, due consideration was given to all the factors involved in the determination of the value to be declared, and the decision was reached to declare the value of petitioner's entire capital stock in the amount of \$2,500,000.00. Despite the intention to establish a declared value of petitioner's capital stock in the amount of \$2,500,000, as the result of error and oversight in dropping two ciphers from the declared value which was to have been reported, a capital stock tax return was filed by your petitioner on September 26, 1936, incorrectly reflecting the declared value of its capital stock as \$25,000.00 instead of \$2,500,000.00.

(b) Prior to the annual closing of petitioner's books for the fiscal year ended January 31, 1937, the mistake made in filing a capital stock tax return indicating an erroneous declared value of \$25,000.00 instead of the correct declared value of \$2,500,000.00, which petitioner intended to declare, was discovered. Thereupon, - on January 27, 1937, four days before the close of the petitioner's fiscal year, an amended capital stock tax return was duly filed with the Collector of Internal Revenue at Baltimore, Md., showing a declared value of \$2,500,000.00, in order to correct the mistake previously made in declaring an erroneous declared value of \$25,000.00 instead of \$2,500,000.00.

(c) On the income and excess-profits tax return filed by
5 your petitioner for the fiscal year ended January 31, 1937,
the excess-profits tax liability for such period was com-
puted upon the basis of using the corrected declared value of its
capital stock, for the capital stock tax year ended Jun. 30, 1936,
in the amount of \$2,500,000.00, and upon such basis no liability for
excess-profits tax was incurred.

(d) In computing the alleged deficiency in excess-profits tax
the Commissioner of Internal Revenue used the incorrect declared
value indicated on petitioner's original return of capital stock tax,
for the capital stock tax year ended June 30, 1936, and upon such
incorrect basis asserted the alleged deficiency in excess-profits tax
in the amount of \$27,947.38.

With respect to IV (b) :

(e) The Commissioner of Internal Revenue has determined excess-profits tax to be due by petitioner for the taxable year ended January 31, 1937 under Section 106 of the Revenue Act of 1935, as amended by Section 402 of the Revenue Act of 1936.

(f) Section 106 of the Revenue Act of 1935, as amended by Section 402 of the Revenue Act of 1936 imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it was taxable under Section 105 of the Revenue Act of 1935, as amended by Section 401 of the Revenue Act of 1936, an excess-profits tax equivalent to the sum of the following:

"6 per centum of such portion of its net income for such income-tax taxable year as is in excess of 10 per centum and not in excess of 15 per centum of the adjusted declared value of capital stock;

6 12 per centum of such portion of its net income for such income-tax taxable year as is in excess of 15 per centum of the adjusted declared value of capital stock."

The adjusted declared value of capital stock shall be determined as provided in Section 105 of the Revenue Act of 1935, as amended by Section 401 of the Revenue Act of 1936, as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year).

(g) Section 105 of the Revenue Act of 1935, as amended by Section 401 of the Revenue Act of 1936, provided that for the first year ending June 30th, in respect of which the capital stock tax was imposed under Section 105, as amended, upon any corporation the adjusted declared value of capital stock shall be the value as declared by the corporation in its first return under Section 105, as amended, as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the capital stock tax was imposed by Section 105, as amended.

(h) Under Sections 105 and 106, as amended, of the Revenue Act of 1935, the laying of the excess-profits tax provided for in Section 106, as amended, of the Revenue Act of 1935, was delegated to taxpayers. However, under Article 1, Section 8, of the Constitution of the United States, the Congress has the power to lay and collect taxes, duties, imposts and excises. Therefore, Section 106, as amended, of the Revenue Act of 1935, is unconstitutional, being in violation of Article 1, Section 8 of the Constitution of the United States. Further, Sections 105 and 106, as amended, of the Revenue Act of 1935 are unconstitutional, being in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States in that Section 105, as amended, compels the payment of a tax based upon an arbitrary and unreasonable

7 amount not easily or accurately ascertainable nor defined within the law itself, nor based upon actual facts, but upon a basis prejudicial to petitioner by reason of its effect upon the tax imposed under Section 106, as amended, of the Revenue Act of 1935 resulting in the arbitrary deprivation or capricious confiscation of petitioner's property.

The petitioner keeps its accounts and renders its returns on the accrual basis of accounting.

Wherefore, the petitioner prays that this Board may hear the proceeding and find that the petitioner does not owe the alleged deficiency in excess-profits tax nor any part thereof asserted by the Commissioner of Internal Revenue in his notice of deficiency dated May 18, 1939; and the petitioner further prays that the Board may give and grant such other and further relief as in the premises the Board may deem fit and proper.

ANDREW B. TRUDGIAN,
Attorney for Petitioner,
125 Park Avenue, New York, N. Y.

(Verified by J. Henry Hersch, as Vice President, on July 10, 1939.)

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Exhibit A to Petition

[Copy]

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
New York, N. Y., May 18, 1939.

Office of Internal Revenue Agent in Charge, U. S. Parcel Post Building, Upper New York Division

LERNER STORES CORPORATION (Md.),
354 Fourth Avenue, New York.

SIRS: You are advised that the determination of your income tax liability for the taxable year ended January 31, 1937, discloses an overassessment of \$6,163.56 and that the determination of your excess-profits tax liability for the year mentioned discloses a deficiency of \$27,947.38 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue

GUY T. HELVERING VS. LERNER STORES CORP.

Agent in Charge, 341 Ninth Avenue, New York City, for the
 attention of Conf. CAC. The signing and filing of this
 9 form will expedite the closing of your return by permitting
 an early assessment of the deficiencies, and will prevent the
 accumulation of interest, since the interest period terminates 30
 days after filing the form, or on the date assessment is made, whichever
 is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner,
 By C. B. ALLEN,
Internal Revenue Agent in Charge.

STATEMENT

Lerner Stores Corporation (Md.), 354 Fourth Avenue, New
 York, N. Y.

Tax Liability for the Taxable Year Ended January 31, 1937

	Liability	Assessed	Deficiency	Overassess- ment
Income Tax.....	\$41,183.75	\$47,357.34		\$6,163.56
Excess-profits tax.....	27,947.38	None	\$27,947.38	
Totals.....	\$69,141.16	\$47,357.34	\$27,947.38	\$6,163.56

In making this determination of your income tax and excess-profits tax liability, careful consideration has been given to the return filed by you and to the internal revenue agent's report transmitted to you by registered letter dated March 17, 1939, to which no reply has been received.

Adjustments to Net Income

Net income as disclosed by return.....	\$1,666,309.27
Unallowable deductions and additional income:	
(a) Capital stock taxes reduced.....	\$2,474.00
(b) Depreciation.....	208.72
Net income adjusted.....	\$1,668,901.99

10 Explanation of Adjustments

(a) You have been allowed a deduction of \$2,002.00 for capital-stock taxes accrued within the taxable year computed on the following basis:	
Declared value.....	\$25,000.00
Plus:	
Income for year.....	1,666,309.27
Issue of Additional Capital Stock.....	1,763,400.00
Total.....	\$3,454,709.27
Less:	
Dividend disbursement.....	1,451,809.48
Corrected Value.....	\$2,002,899.79

On a basis of \$1.00 per \$1,000.00, the proper accrual for capital-stock taxes amounts to \$2,002.00. Inasmuch as you claimed a deduction of \$4,476.00 the difference or \$2,474.00 has been disallowed.

(e) The depreciation deduction of \$9,564.58 as claimed by you has been decreased in the amount of \$208.72 based on the following schedule:

EXHIBIT B

Furniture and fixtures		Estimated useful life—10 years		Adjusted life—10 years	
Year acquired	Original cost	Depreciation reserve	Balance	Remaining life	Depreciation for year
1926.....	\$47,279.77	\$39,133.66	\$8,146.11	2	A \$1,697.10 L 2,375.95
1927.....				3	
1928.....				4	
1929.....	85,728.40	54,116.05	31,612.35	5	A 2,634.38 L 3,688.00
1930.....	40,518.50	21,058.66	19,459.84	6	A 1,351.41 L 1,891.89
1931.....	20,295.87	8,361.86	11,934.01	7	A 710.37 L 904.49
11 1932.....	8,131.90	2,571.97	5,559.93	8	A 289.55 L 405.44
	201,954.44	125,242.20	76,712.24		A 6,682.81 L 9,355.86
<hr/>					
A—Represents depreciation deducted by Associated Lerner Stores of America, Inc. to date of liquidation 2/1/36 to July 7, 1936.					
L—Represents depreciation allowable to Lerner Stores Corp. (Maryland) from 7/1/36 to 1/31/1937.					
Total depreciation claimed.....					\$9,564.58
Total depreciation allowed.....					9,355.86
Depreciation disallowed.....					\$208.72

The reduction of income taxes result from the allowance of the \$27,947.38 excess-profits tax, herein computed, as a credit against net income in computing the income tax liability.

You are liable for excess-profits taxes for the taxable year based on the original \$25,000.00 declared value as shown by your 1936 return of capital stock tax for the year ending June 30, 1936 in accordance with Section 106 of the Revenue Act of 1935 as amended by Section 402 of the Revenue Act of 1936; and Section 105 of the Revenue Act of 1935 as amended by section 401 of the Revenue Act of 1936. See also Chicago Telephone Supply Company vs. U. S., U. S. Ct. Cl. No. 43657, May 31, 1938, 23 F. Supp. 471, certiorari denied 10/10/38; and William A. Webster Co., Inc., 37 B. T. A. 800.

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Computation of Tax

Excess profits tax:				
Taxable net income				\$1,668,991.99
Less:				
Dividends received credit (85% of \$1,385,849.50)				\$1,432,972.07
10% of \$25,000.00 value of capital stock as declared in your capital stock tax return for the year ended 6/30/36			2,500.00	1,435,472.07
Net income subject to excess profits tax				\$233,519.92
5% of declared value of capital stock				1,250.00
Balance				\$232,269.92
Excess profits tax:				
6% of \$1,250.00				75.00
12% of \$232,269.92				27,872.38
Total excess profits tax				27,947.38
Excess profits tax assessed:				
Original 1937 List Account No. 4-400008				None
Deficiency of excess profits tax				\$27,947.38
Income Tax:				
Normal Tax:				
Taxable net income				\$1,668,991.99
Less:				
Excess profits tax				27,947.38
Net income for Normal tax computation				1,641,044.61
13. Less:				
85% of dividends received from taxable domestic corporation				1,432,972.07
Normal tax net income				\$208,072.54
8% of \$2,000.00				160.00
11% of \$13,000.00				1,430.00
13% of \$25,000.00				3,250.00
15% of \$168,072.54				25,210.88
Total Normal tax				\$30,050.88
Surtax on Undistributed profits:				
Taxable net income				\$1,668,991.99
Less:				
Excess prots taxes				\$27,947.38
Normal tax			30,050.88	57,998.26
(a) Adjusted net income				\$1,610,993.73
Less:				
Dividends paid credit				1,451,809.48
(b) Undistributed net income				159,184.25
Less:				
Specific credit				None

Less—Continued.

(c) Remainder subject to surtax.....	\$159,184.25
7% of \$159,184.25.....	11,142.90
Total surtax.....	11,142.90
Normal tax.....	30,050.88
 Total income tax (Normal tax and surtax).....	 \$41,193.78
Income tax assessed: Original 1937 list, Account No. 4-400008.....	 47,357.34
 Overassessment of income tax.....	 \$6,163.56

14 Before United States Board of Tax Appeals*Answer***Filed July 28, 1939**

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

I. Admits the allegations contained in Paragraph I of the petition.

II. Admits the allegations contained in Paragraph II of the petition.

III. Admits that the taxes in controversy are excess profits taxes in the amount of \$27,947.38 for the fiscal year ended January 31, 1937. Denies that petitioner's return of income and excess profits tax for said fiscal year was filed in the office of the Collector of Internal Revenue for the Third District of New York.

IV. (a), (b). Denies that the respondent erred as alleged in sub-paragraphs (a) and (b) of Paragraph IV of the petition.

V. (a). Admits that a capital stock tax return was filed by petitioner on September 26, 1936, reflecting the declared value of its capital stock as \$25,000.00. Denies the remaining allegations contained in sub-paragraph (a) of Paragraph V of the petition.

(b), (c). Denies the allegations of fact contained in sub-paragraphs (b) and (c) of Paragraph V of the petition.

(d). Admits that in computing the deficiency in excess profits tax the Commissioner used the declared value of \$25,000.00
 15 for the capital stock tax year ended June 30, 1936, but
 denies that he committed error in so doing. Denies the remaining allegations contained in sub-paragraph (d) of Paragraph V of the petition.

(e). Admits the allegations of fact contained in subparagraph (e) of Paragraph V of the petition.

(f), (g), (h). Denies the allegations of fact contained in subparagraphs (f), (g), and (h) of Paragraph V of the petition.

VI. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and that petitioner's appeal be denied.

J. P. WENCHEL,

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

E. O. HANSON,

Division Counsel.

HAROLD D. THOMAS,

Special Attorney, Bureau of Internal Revenue.

16 Before United States Board of Tax Appeals

Memorandum findings of fact and opinion

Sept. 20, 1940

Andrew B. Trudgian, Esq., for the petitioner.

H. D. Thomas, Esq., for the respondent.

LEECH: This is a proceeding to redetermine a deficiency of \$27,947.38 in excess-profits tax for the fiscal year ended January 31, 1937. Two issues are presented for decision. The first is whether petitioner is bound by its erroneous declaration of value on a capital stock tax return which was filed prior to the expiration of an extended period for filing such returns. The second question is whether the tax imposed by section 106 of the Revenue Act of 1935, as amended by the Revenue Act of 1936, is constitutional.

Findings of fact

Petitioner is a corporation organized under the laws of Maryland, with its principal offices in New York City, New York. It owns 52 subsidiary companies and its income consists of dividends from the latter.

Petitioner was granted an extension of time to September 29, 1936, within which to file its capital stock tax return for the year ended June 30, 1936. Pursuant to that extension, and on September 27, 1936, petitioner filed a capital stock tax return for the year ended June 30, 1936, in which it declared a value of \$25,000 for its capital stock. In the computation of tax on that return

the tax due was reported to be \$25 and the interest was reported as \$.25, making a total of \$25.25. The return was signed by J. H. Hersch and Graham Magee, both of whom were vice presidents of petitioner, and was duly sworn to by them under oath.

The figure of \$25,000 entered on the return was erroneous: the error arose through a mistake made by an employee of petitioner.

17 On January 27, 1937, petitioner forwarded a document prepared on Form 707 (the capital stock tax return form), which was stated to be an amended capital stock tax return for the year ending June 30, 1936. Under item 8 of this form, opposite the words "Declared Value of Entire Capital Stock," there was entered the figure of \$2,500,000. The amount of tax, penalty, and interest computed by petitioner on the form was \$3,090, consisting of a tax of \$2,500, a penalty of \$500, and interest of \$90.

The mistake in the first return was discovered by Hersch in the course of going over petitioner's accounts prior to the end of petitioner's fiscal year, which ended January 31, 1937.

By letter dated July 12, 1937, respondent advised petitioner that the declaration of value on the document sought to be filed as an amended return could not be accepted. The amount of money paid in connection with the so-called amended return was refunded to petitioner.

In computing the deduction of 10 per cent of the declared value in determining the net income of petitioner subject to excess-profits tax for the fiscal year ended January 31, 1937, respondent employed the declared value appearing on the first capital stock tax return, namely, \$25,000.

Opinion

Although we have found as a fact that the figure entered in petitioner's first return as the value of its capital stock was a mistake on the part of one of petitioner's employees, that finding is not particularly important to our disposition of this case, inasmuch as in these matters either a mistake or a change of mind has the same legal consequences.

The only question for a decision is whether petitioner may correct the error by filing an amended return after the period for filing the capital stock tax return has expired. This question has 18 been conclusively resolved against petitioner by the case of William B. Scaife & Sons Co., 41 B. T. A. 278. Furthermore, *Hagger Co. v. Helvering*, 308 U. S. 389, which is extensively relied upon by petitioner here, gives no support to petitioner's position, for the court goes no further there than to hold that a taxpayer may file an amendment to the first document he has filed

as a capital stock tax return within the time designated by statute for filing capital stock tax returns, or within such time thereafter as may be properly fixed by the Treasury. It does not hold that an amended return can successfully be filed after that period has run. See William B. Scaife & Sons Co., *supra*. We therefore resolve the first question against petitioner.

The next question is whether the excess-profits tax is constitutional. Petitioner attacks it on a number of grounds, but none of them seems to us to be any different than those advanced and passed upon adversely to petitioner in a number of cases which have sustained the excess-profits tax now before us or its earlier counterparts. *Chicago Telephone Supply Co. v. United States*, 23 Fed Supp. 471; cert. denied, 305 U. S. 628; *Patrick McGovern, Inc.*, 40 B. T. A. 705; *Allied Agents, Inc. v. United States*, 26 Fed. Supp. 98; cert. denied, 308 U. S. 561; *W. & K. Holding Corporation*, 38 B. T. A. 830; *Midvale Paper Board Co., Inc. v. United States*, 31 Fed. Supp. 851; *Mountain Iron Co. et al. v. United States*, 31 Fed. Supp. 895.

It is therefore our conclusion that respondent must be sustained on both issues.

Decision will be entered for the respondent.

Entered September 20, 1940.

————— [SEAL] ———

19 Before United States Board of Tax Appeals

Decision

Entered Sept. 20, 1940

Pursuant to the determination of the Board, as set forth in its Memorandum Findings of Fact and Opinion entered September 20, 1940, it is

Ordered and decided: That there is a deficiency in excess-profits tax ~~for~~ the year ended January 31, 1937, in the amount of \$27,947.38.

Enter,

[SEAL]

(Signed) J. RUSSELL LEECH,
Member.

Before United States Board of Tax Appeals

Stipulation of venue

Filed Oct. 24, 1940

It is hereby stipulated and agreed by and between the parties to the above-entitled cause, by their respective undersigned at-

torneys, that the decision of the United States Board of Tax Appeals in said cause, dated September 20, 1940, and redetermining deficiency in Excess-Profits Taxes against the above-named petitioner for the fiscal year ended January 31, 1937, in the amount of \$27,947.38, may be reviewed by the United States Circuit Court of Appeals for the Second Circuit.

This agreement is made under and pursuant to the provisions of Section 1141 of the Internal Revenue Code.

Dated 23rd day of October, 1940.

ANDREW B. TRUDGLIAN,
Attorney for Petitioner.
SAMUEL O. CLARK, Jr.,
Attorney for Respondent.

20 In United States Circuit Court of Appeals, Second
Circuit

Petition for review and assignment of errors

Filed Oct. 24, 1940

*To the Honorable, the Judges of the United States Circuit Court
of Appeals for the Second District:*

I

JURISDICTION

Lerner Stores Corporation (Md.), your petitioner, respectfully petitions this Honorable Court to review the decision of the United States Board of Tax Appeals entered on September 20, 1940, and finding a deficiency in Excess-Profits tax due from your petitioner for the fiscal year ended January 31, 1937, in the amount of \$27,947.38.

Your petitioner is a corporation organized under the laws of the State of Maryland, having its principal office and place of business at 354 Fourth Avenue, New York, N. Y.

On the 23rd day of October 1940, counsel for the petitioner and counsel for the Commissioner of Internal Revenue entered into a stipulation in writing under and pursuant to the provisions of Section 1141 of the Internal Revenue Code, wherein they designated the United States Circuit Court of Appeals for the Second Judicial Circuit as the appropriate Court to review the said decision of the United States Board of Tax Appeals.

Jurisdiction in this Court to review the decision of the United States Board of Tax Appeals aforesaid is founded upon Sections 1141 and 1142 of the Internal Revenue Code.

II

NATURE OF THE CONTROVERSY

The petitioner duly filed a Capital Stock Tax Return for the year ended June 30, 1936, showing a declared value as of January 31, 1936, in the amount of \$25,000.00. The officer supervising the filing of the Capital Stock Tax Returns for the petitioner and its fifty-two subsidiaries decided upon a declared value in the amount of \$2,500,000.00. However, through a clerical error on the part of a subordinate employee engaged in manually preparing the return, the \$25,000.00 figure was actually inserted on the return. Upon discovery of the error prior to the expiration of petitioner's fiscal year, on January 27, 1937, the petitioner filed an amended Capital Stock Tax Return showing the correct amount of \$2,500,000.00.

The Commissioner of Internal Revenue refused to accept the amended return, or to recognize the corrected declared value in the amount of \$2,500,000.00. In computing the ten per cent of the declared value as of January 31, 1936, allowed as a deduction in determining the amount of the net income of the petitioner subject to Excess-Profits tax for the fiscal year ended January 31, 1937, the Commissioner employed the declared value appearing on the first Capital Stock Tax Return, *viz*, \$25,000.00. This resulted in a deficiency of \$27,947.38 for the fiscal year ended January 31, 1937, as per the deficiency letter of the Commissioner of Internal Revenue dated May 18, 1939.

From this determination the petitioner appealed to the United States Board of Tax Appeals on July 11, 1939, assigning as error:

1—The refusal of the Commissioner to allow as a deduction, in determining the net income of the petitioner subject to Excess-Profits Tax, ten per cent of \$2,500,000.00, the corrected declared value as of January 31, 1936, appearing on the amended Capital Stock Tax Return;

2—The determination by the Commissioner of a deficiency in Excess-Profits Tax pursuant to the provisions of Section 106 of the Revenue Act of 1935, as amended by Section 402 of the Revenue Act of 1936, whereas those sections of law and the Excess-Profits Tax imposed thereunder are invalid and unconstitutional under the Constitution of the United States of America.

In a decision entered on September 20, 1940, the Board sustained the Commissioner on both points.

III

ASSIGNMENT OF ERRORS

In making its decision as aforesaid, the United States Board of Tax Appeals committed the following errors upon which your petitioner relies as the basis of its proceeding:

1—The Board erred in holding that, in determining the net income of the petitioner subject to Excess-Profits Tax for the fiscal year ended January 31, 1937, the declared value as of January 31, 1936, shall be the value inserted through clerical error of a subordinate employee on the first Capital Stock Tax Return filed for the year ended June 30, 1936, rather than the intended value appearing on the corrected Capital Stock Tax Return filed on January 27, 1937, prior to the close of the petitioner's fiscal year ending January 31, 1937.

2—The Board erred in holding that the Excess-Profits tax, imposed by Section 106 of the Revenue Act of 1935, as
23 amended by Section 402 of the Revenue Act of 1936, is valid and constitutional under the Constitution of the United States of America.

Wherefore, your petitioner prays that this Honorable Court may review the decision and order of the United States Board of Tax Appeals and reverse and set aside the same and direct the said Board to enter a decision and order that there is no deficiency in Excess-Profits tax for the fiscal year ended January 31, 1937; and for the entry of such further orders and directions as shall by this Court be deemed meet and proper, in accordance with law.

ANDREW B. TRUDGIAN,
Attorney for Petitioner,
125 Park Avenue, New York, N. Y.

(Verified October 21, 1940.)

In United States Circuit Court of Appeals

Notice of filing petition for review

Filed Oct. 24, 1940

To:

COMMISSIONER OF INTERNAL REVENUE,
Internal Revenue Building, Washington, D. C.

J. P. WENCHEL,
Attorney for Respondent,
Chief Counsel, Bureau of Internal Revenue,
Washington, D. C.

You are hereby notified that on the 24th day of October 1940
a petition for review by the United States Circuit Court of
24 Appeals for the Second Circuit of the decision of the United
States Board of Tax Appeals heretofore rendered in the
above-entitled cause, was filed with the Clerk of the Board. A
copy of the petition as filed is attached hereto and served upon you.

Dated October 24, 1940.

ANDREW B. TRUDGIAN.
Attorney for Petitioner.
125 Park Avenue, New York, N. Y.

Personal service of the foregoing notice, together with a copy of
the petition for review mentioned therein, is hereby acknowledged
this 24th day of October 1940.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

Before United States Board of Tax Appeals

Præcipe for transcript

Filed Nov. 6, 1940

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the Clerk of the
United States Circuit Court of Appeals for the Second Circuit,
copies duly certified as correct, the following documents and rec-
ords in the above-entitled cause in connection with the petition
for review by the said Circuit Court of Appeals for the Second
Circuit, heretofore filed by the above-named petitioner:

- 25 1—Docket entries of the proceedings before the Board.
 2—Petition for redetermination filed on July 11, 1939, together with annexed copy of deficiency letter.
 3—Answer of the respondent filed on July 28, 1939.
 4—Memorandum Finding of Facts and Opinion of the Board, promulgated September 20, 1940.
 5—Decision of the Board entered September 20, 1940.
 6—Petition for review filed on October 24, 1940.
 7—Notice of filing petition for review.
 8—This Praeclipe for record.
 9—Notice of filing this Praeclipe for record and the admission of service thereof.

10—Stipulation designating the Circuit Court of Appeals for the Second Circuit as the appropriate court of review.

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

ANDREW B. TRUDGIAN,
Attorney for Petitioner.

Service of a copy of this praecipe is hereby admitted this 31st day of October, 1940.

Agreed to—

J. P. WENCHEL,
*Chief Counsel, Bureau of Internal Revenue,
Attorney for Respondent.*

26 Before United States Board of Tax Appeals

Notice of Filing of Praeclipe

Filed Nov. 6, 1940

To: Hon. J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Internal Revenue Building, Washington, D. C.

Please take notice that on the 31st day of October, 1940, the undersigned, attorney for Lerner Stores Corporation (Md.), petitioner in the above-entitled proceeding, has filed with the Clerk of the United States Board of Tax Appeals a Praeclipe for Record, a copy of which is annexed hereto.

Dated October 31, 1940.

ANDREW B. TRUDGIAN,
Attorney for Petitioner.

Receipt of the foregoing notice of filing of the Praeclipe for Record and service of a copy of the praecipe herein mentioned is acknowledged this 31st day of October, 1940.

J. P. WENCHEL,

Chief Counsel,

Bureau of Internal Revenue,

Attorney for Respondent.

- 27 [Clerk's Certificate to foregoing transcript omitted in printing.]

UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT

OCTOBER TERM, 1940

No. 188

(Decided March 24, 1941)

LERNER STORES CORPORATION (Md.), PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition to review a decision of the United States Board of Tax Appeals

The taxpayer seeks reversal of a decision of the Board which affirmed the commissioner's determination of a deficiency in the petitioner's excess profits tax for the fiscal year ending January 31, 1937.

Before SWAN, AUGUSTUS N. HAND and CHASE, Circuit Judges

SWAN, Circuit Judge: The tax in dispute is the petitioner's excess profits tax for the fiscal year 1937. Sections 105 and 106 of the Revenue Act of 1935, 49 Stat. 1017, as amended by sections 401 and 402 of the Revenue Act of 1936, 49 Stat. 1733, impose interrelated taxes on domestic corporations, namely a capital stock tax and an excess profits tax, calculated on the basis of the value of the capital stock as declared in the corporation's capital stock tax return for the first year in which the tax is imposed. The main question presented by the case at bar is whether a clerical error in the declared value of the capital stock as stated in a timely return may be corrected by filing a late amended return. To this question the Board of Tax Appeals gave a negative answer.

The facts as found by the Board are as follows: The petitioner is a corporation organized under the laws of Maryland, with its principal office in New York City. Its income is derived from dividends paid by subsidiary companies which it owns. Within the permitted time the petitioner filed a capital stock tax return for the first year ending June 30, 1936, in which the declared value of its capital stock was stated to be \$25,000. This figure was entered on the return in error, through a mistake made by an employee of the

petitioner. After discovering the error the petitioner, on January 27, 1937, forwarded to the commissioner what purported to be an amended capital stock tax return for the year ending June 30, 1936, in which the declared value of its capital stock was given as \$2,500,000, and payment was made of tax, penalty and interest computed on such amended return. On July 12, 1937, the commissioner advised the petitioner that the declaration of value on the document sought to be filed as an amended return could not be accepted. The money paid in connection with the so-called amended return was refunded to the petitioner. In determining the petitioner's net income subject to excess profits tax for the fiscal year ended January 31, 1937, the commissioner used the declared value of \$25,000 appearing on the first capital stock tax return. This resulted in the deficiency complained of. The Board sustained the commissioner, saying that although it had found as a fact that the figure of \$25,000 "was a mistake on the part of one of petitioner's employees," such finding was immaterial "inasmuch as in these matters either a mistake or a change of mind has the same legal consequences." The correctness of this ruling is the first question for consideration.

Section 105 (a) imposes on a domestic corporation an annual excise tax at the rate of "\$1 for each \$1,000 of the adjusted declared value of its capital stock." Section 105 (f) provides that "For the first year * * * the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), * * *." Despite this prohibition against amendment, a capital stock tax return may be amended within the time fixed for filing the first return. *Haggar Co. v. Helvering*, 308 U. S. 389. As Mr. Justice Stone there points out, at page 394, the purpose of the statute is to allow the taxpayer to fix for itself the taxable base for purposes of computation of the capital stock tax, but with the proviso that the amount thus fixed for the first taxable year shall be accepted for computing both capital stock and excess profits taxes in later years. It contemplates an exercise of judgment—"declaration of value"—by the taxpayer and a report of its decision in the return. Up to the time when the return is due, the taxpayer may change its judgment and report a higher value, as in the *Haggar* case; but a change of judgment thereafter cannot affect its taxes, for "the declaration of value cannot be amended." But we are not confronted with a change of judgment by the taxpayer; the case at bar presents a situation where the taxpayer has made but one "declaration of value" and has inaccurately reported it to the commissioner due to an error of one of its employees. The correction of such a clerical mistake before the commissioner has acted in reliance upon it in computing taxes for a later year cannot thwart the purposes of the statute or injure the interests of the government. The purpose of interlocking the excess profits tax with the capital stock tax was to induce corporations to exercise an honest judgment in declaring a fair or reasonable value

upon their stock. See *Glenn v. Oertel Co.*, 97 F. 2d 495, 496 (C. C. A. 6); *Rochester Gas & Electric Corp. v. McGowan*, 115 F. 2d 953, 954 (C. C. A. 2). The statute did not contemplate that the computation of the taxes would be based on clerical mistakes, and we can perceive no good reason for construing it to forbid their correction either before or after the return date, in the absence of facts raising an estoppel against the taxpayer. Suppose, for example, a corporation fails to file a capital stock return, or files one in which, through a typographical error, no figure whatever was inserted as the "declared value" of its stock. We cannot believe that a late return, in the first case, or an amended return, in the other, would not be received to enable the commissioner to assess the capital stock tax which the statute imposes. *C. Flomot Gin Co. v. Commissioner*, 40 B. T. A. 689. It is true that strict proof should be required to establish that the value stated in a return resulted from a clerical mistake; the amendment must not be used to substitute a declared valuation more favorable in the light of later events than the one originally decided upon and reported by the taxpayer. See *Riley Co. v. Commissioner*, 311 U. S. 55, 59. But granted that the valuation stated in the return was due to a clerical error, we think no sound reason can be advanced for not permitting it to be corrected before the commissioner has acted in reliance on it. Not to do so deprives the taxpayer of the privilege the statute accords to exercise its own judgment in fixing the taxable base.

The respondent cites *Riley Co. v. Commissioner*, 311 U. S. 55, as opposed to the conclusion we have reached. The statute there involved gave the taxpayer an election to take a percentage depletion allowance if he claimed it in his "first return." In ignorance of the statute, he failed to claim it originally but attempted to do so by an amended return. He was denied the right to do so; he elected too late. This case would be apposite if the petitioner at bar were attempting by amendment to change its judgment of the value to declare for its stock. It is not controlling where the amendment seeks to correct a clerical error in the return. Mr. Justice Douglas was careful to state at page 58, "We are not dealing with an amendment designed merely to correct errors and miscalculations in the original return. Admittedly the Treasury has been liberal in accepting such amended returns even though filed after the period for filing original returns." A case in the third circuit, *Wm. B. Scaife & Sons Co. v. Commissioner*, decided January 21, 1941, and not yet officially reported, supports the ruling of the Board. For the reasons already stated we respectfully disagree with it.

The petitioner attacks the constitutionality of the excess profits tax. This we ruled upon in *Rochester Gas & Electric Corp. v. McGowan*, 115 F. 2d 953, and are content to stand upon that opinion. Order reversed.

United States Circuit Court of Appeals, Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of April one thousand nine hundred and forty-one.

Present: Hon. THOMAS W. SWAN, Hon. AUGUSTUS N. HAND, Hon. HARRIE B. CHASE, Circuit Judges.

LERNER STORES CORPORATION (Md.), PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is reversed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. ROBERTS, Clerk,
by A. M. BELL, Deputy Clerk.

Order for mandate—Filed Apr. 12, 1941—D. E. Roberts, Clerk.

UNITED STATES OF AMERICA,

Southern District of New York:

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 34, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Lerner Stores Corporation (Md.), Petitioner against Commissioner of Internal Revenue, Respondent, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this eleventh day of June, in the year of our Lord one thousand nine hundred and forty-one, and of the Independence of the said United States the one hundred and sixty-fifth.

[SEAL]

D. E. ROBERTS, Clerk.

Supreme Court of the United States

[Title omitted.]

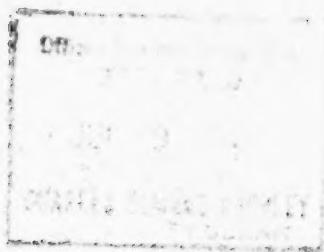
Order allowing certiorari

Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY



248
No. —

In the Supreme Court of the United States

OCTOBER TERM, 1941

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

v.

LERNER STORES CORPORATION (Md.)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. —

**GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER**

v.

LERNER STORES CORPORATION (Md.)

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT**

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause on April 12, 1941.

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 16-18) is not reported. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 28-30) is reported in 118 F. (2d) 455.

JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered April 12, 1941 (R. 31). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer filed a timely capital stock tax return. In that return, it declared a value of \$25,000 for its capital stock. This figure was entered on the return through a mistake made by an employee. The question is whether the taxpayer has a statutory right to file an amended return changing its declaration of value after the time for filing the original return has expired.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 6-9.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 16-17) are as follows:

Taxpayer, a corporation, was granted an extension of time to September 29, 1936, within which to file its capital stock tax return for the year ended June 30, 1936. Pursuant to that extension, and on September 27, 1936, taxpayer filed a capital stock tax return in which it declared a value of \$25,000 for its capital stock. In the computation of tax on

that return, the tax due was reported as \$25 and the interest was reported as 25¢, making a total of \$25.25. The return was signed by J. H. Hersch and Graham Magee, both of whom were vice presidents of taxpayer, and was duly sworn to by them under oath (R. 16).

The figure of \$25,000 entered on the return was erroneous; the error arose through a mistake made by an employee of the taxpayer (R. 16).

On January 27, 1937, taxpayer forwarded a document prepared on Form 707 (the capital stock tax return form), which was stated to be an amended capital stock tax return for the year ended June 30, 1936. Under item 8 of this form, opposite the words "Declared Value of Entire Capital Stock," the figure of \$2,500,000 was entered. The amount of tax, penalty and interest computed by the taxpayer on the form was \$3,090, consisting of a tax of \$2,500, a penalty of \$500, and interest of \$90 (R. 17).

The mistake in the first return was discovered by Hersch in the course of going over taxpayer's accounts prior to the end of taxpayer's fiscal year, which ended January 31, 1937 (R. 17).

By letter dated July 12, 1937, the Commissioner advised the taxpayer that the declaration of value on the document sought to be filed as an amended return could not be accepted. The amount of money paid in connection with the so-called

amended return was refunded to the taxpayer (R. 17).

In computing the deduction of 10% of the declared value of the taxpayer's capital stock in determining taxpayer's net income subject to the excess-profits tax for the fiscal year ended January 31, 1937, the Commissioner employed the declared value of \$25,000 appearing on the first capital stock tax return (R. 17). On this basis, he determined a deficiency of \$27,947.38 in excess-profits tax (R. 8). The Board of Tax Appeals sustained this action of the Commissioner (R. 18), but the Circuit Court of Appeals reversed (R. 31).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding and deciding that the taxpayer could amend its capital stock tax return after the statutory period as extended had expired.
2. In failing to hold and decide that the taxpayer was bound by the valuation declared in its original capital stock tax return for the purpose of assessing the related excess profits tax.
3. In reversing the order of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. On June 2, 1941, this Court granted a petition for a writ of certiorari in *Scaife Co. v. Commissioner*, No. 57, October Term, 1941. That petition was based upon an asserted direct conflict with the

decision reached by the court below in the present case. Although, for the reasons pointed out in the Government's memorandum in the *Scaife* case, we believe the two cases to be distinguishable, the court below held an opposite view, stating (R. 30) :

A case in the Third Circuit, *Wm. B. Scaife & Sons Co. v. Commissioner*, * * * supports the ruling of the Board. For the reasons already stated we respectfully disagree with it.

In the light of this statement, it is apparent that the court below would have decided the *Scaife* case otherwise than it was decided by the Circuit Court of Appeals for the Third Circuit, and that to that extent at least a conflict of decisions exists. Since this Court granted the petition in the *Scaife* case, the present petition should likewise be granted in order that an authoritative ruling may be made on the related issues presented in the two cases.

2. The decision below is probably in conflict with the principle enunciated by this Court in *Riley Co. v. Commissioner*, 311 U. S. 55, to the effect that there is no statutory right to file an amended return after the expiration of the time for filing the original return.

CONCLUSION

Therefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Acting Solicitor General.

JULY 1941.

APPENDIX

Revenue Act of 1935, c. 829, 49 Stat. 1014:

SEC. 105. CAPITAL STOCK TAX [as amended by Section 401 of the Revenue Act of 1936, c. 690, 49 Stat. 1648].

(a) For each year ending June 30, beginning with the year ending June 30, 1936, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of \$1 for each \$1,000 of the adjusted declared value of its capital stock.

* * * * *

(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Maryland.

* * * * *

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at

or prior to the close of the year for which the tax is imposed by this section). * * *

SEC. 106. EXCESS-PROFITS TAX [as amended by Section 402 of the Revenue Act of 1936, c. 690, 49 Stat. 1648].

(a) There is hereby imposed upon the net income of every corporation for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 105, an excess-profits tax equal to the sum of the following:

6 per centum of such portion of its net income for such income-tax taxable year as is in excess of 10 per centum and not in excess of 15 per centum of the adjusted declared value;

12 per centum of such portion of its net income for such income-tax taxable year as is in excess of 15 per centum of the adjusted declared value.

(b) The adjusted declared value shall be determined as provided in section 105 as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year). If the income-tax taxable year in respect of which the tax under this section is imposed is a period of less than 12 months, such adjusted declared value shall be reduced to an amount which bears the same ratio thereto as the number of months in the period bears to 12 months. For the purposes of this section the net income shall be the same as the net income for income-tax purposes for the year in respect of which the tax under this section is imposed, computed without the deduction of the tax imposed by this section, but with a credit against net income equal to the credit for dividends received provided in section 26 (b) of the Revenue Act of 1936.

Treasury Regulations 64 (1936 Ed.):

ART. 44. *Original declared value* [as amended by T. D. 4667, XV-2 Cum. Bull. 312, 314.]—(a) In its first return a corporation must declare a definite and unqualified value for its capital stock. “First return” means the first capital stock tax return filed by a corporation for its first taxable year under section 105. Extreme care should be exercised in making this original declared value, for the reason that if a return has been filed disclosing a declared value, such value cannot be changed, amended, or corrected, either by the corporation or by the Commissioner. A subsequent return declaring a different value, even though filed before the expiration of the prescribed period, is therefore not acceptable under the statute. The importance of the original declared value may be seen from the fact that such original declared value forms the basis for the computation of the tax on capital stock in years subsequent to the first taxable year, and constitutes a prime factor in determining the amount of tax imposed on excess profits under section 106 of the Revenue Act of 1935, as amended by section 402 of the Revenue Act of 1936.

* * * * *

ART. 45. *Adjusted declared value*.—(a) *First taxable year.*—The adjusted declared value for the first taxable year is the original declared value.

If a corporation was in existence during the entire taxable year ended June 30, 1936, the adjusted declared value shall be as of the close of its last income-tax taxable year which ended prior to July 1, 1936. If a corporation makes its Federal

income tax return on a calendar year basis, the value declared must be as of December 31, 1935. If a corporation makes its income tax return on a fiscal year basis, the value must be declared as of the close of such fiscal year ended prior to July 1, 1936.

* * * * *

T. D. 4971, 1940-1 Cum. Bull. 236:

5. Article 44 (a) of Regulations 64 (Capital Stock Tax), approved May 6, 1936, as amended by Treasury Decision 4667, approved July 18, 1936, is amended to read as follows:

(a) In its first return a corporation must declare a definite and unqualified value for its capital stock. Extreme care should be exercised in making this original declared value, for the reason that if a return has been filed disclosing a declared value, such value can not be changed, amended, or corrected, either by the corporation or by the Commissioner after the expiration of the statutory period (or any extension thereof) within which the return is required to be filed. The importance of the original declared value may be seen from the fact that such original declared value forms the basis for the computation of the tax on capital stock in years subsequent to the first taxable year, and constitutes a prime factor in determining the amount of tax imposed on excess profits under section 106 of the Revenue Act of 1935.



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Office - Supreme Court, U. S.
FILED

NOV 6 1941

CHARLES EDMUND GROPLEY
CLERK

No. 248

In the Supreme Court of the United States

OCTOBER TERM, 1941

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

v.

LERNER STORES CORPORATION (Md.)

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER



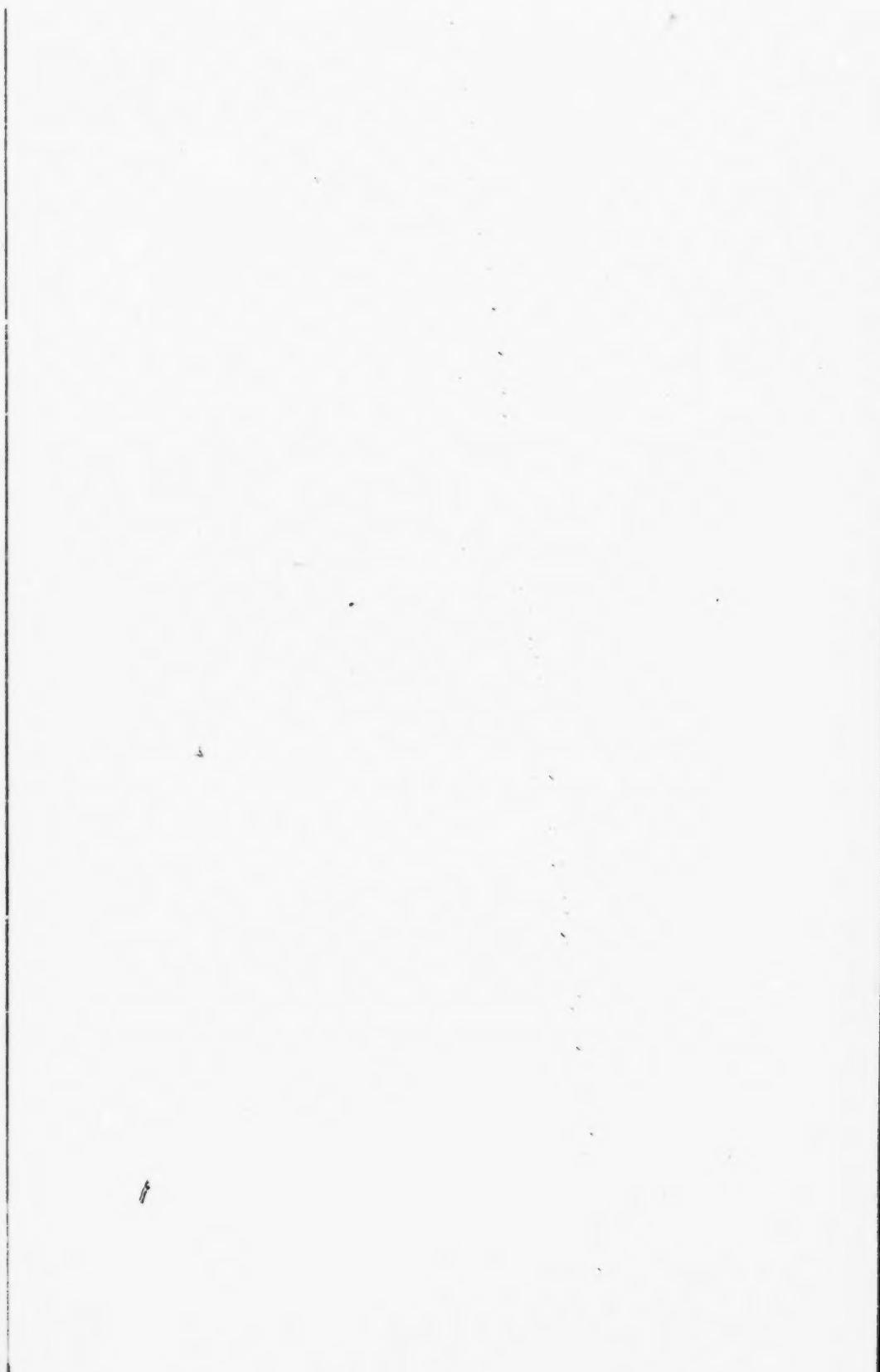
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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 248

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

v.

LERNER STORES CORPORATION (Md.)

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 11) is not reported. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 28-30) is reported in 118 F. (2d) 455.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 12, 1941. (R. 31.) The petition for a writ of certiorari was filed July 8, 1941,

and was granted October 13, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Taxpayer filed a timely capital stock tax return in which, because of a clerical error made by one of its employees, it declared a value for its capital stock lower than that which it had intended to declare. The question is whether, after the period for filing original returns had expired, the taxpayer was entitled to file an amended return changing the declaration to the value originally intended.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix to the Government's brief in *Scaife Co. v. Helvering*, No. 57, present Term.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 10) may be summarized as follows:

Taxpayer corporation was granted an extension of time to September 29, 1936, within which to file its capital stock tax return for the year ended June 30, 1936. It filed its return on September 27, 1936, declaring a value of \$25,000 for its capital stock. The figure of \$25,000 was entered on the return through a mistake made by one of tax-

payer's employees. In the computation, the tax due was reported to be \$25 and the interest was reported as 25¢, making a total of \$25.25. The return was signed and sworn to by J. H. Hersch and Graham Magee, both of whom were vice-presidents of the taxpayer.

In the course of going over the taxpayer's accounts prior to the end of its fiscal year (January 31, 1937), Hersch discovered the error in declaring the capital stock at \$25,000. Thereafter, on January 27, 1937, taxpayer forwarded an amended capital stock tax return on which it entered the figure of \$2,500,000 opposite the words "Declared Value of Entire Capital Stock." The amount of tax, penalty and interest computed by the taxpayer on the form was \$3,090, consisting of a tax of \$2,500, a penalty of \$500, and interest of \$90. By letter dated July 12, 1937, the Commissioner advised taxpayer that the alleged amended return could not be accepted, and refunded the money paid with it.

In computing the taxpayer's net income subject to excess profits tax for the fiscal year ended January 31, 1937, the Commissioner used the \$25,000 declared value appearing on the first capital stock tax return; on that basis he determined a deficiency of \$27,947.38 in excess profits tax (R. 11). The Board sustained the action of the Commissioner (R. 12) but the court below reversed (R. 30).

ARGUMENT

This case presents substantially the same question as that presented in *Scaife Company v. Helvering*, No. 57, present Term, with which the present case is to be argued. Accordingly, we refer the Court to our brief in the *Scaife* case for the reasons why we believe the decision in this case should be reversed.

The present case, it is true, presents equities more favorable to the taxpayer, because the error in declaring the value here was the result of a clerical mistake made by an employee of the taxpayer, while the error in the *Scaife* case lay in the inadvertent disregard by the taxpayer's treasurer of the vice-president's instructions. However, for the reasons set forth in our brief in the *Scaife* case, we believe that neither type of mistake justifies reading into the statute a right of amendment which Congress not only failed to provide but which it explicitly prohibited.

Respectfully submitted,

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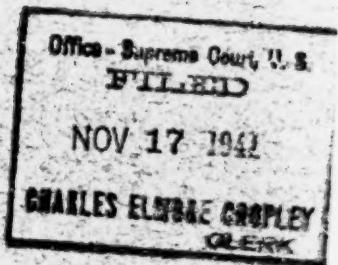
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OCTOBER, 1941



FILE COPY



No. 248

In the Supreme Court of the United States

OCTOBER TERM, 1941

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
PETITIONER

v.

LERNER STORES CORPORATION (Md.)

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER



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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 248

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
PETITIONER

v.

LERNER STORES CORPORATION (Md.)

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In its brief respondent attacks the constitutionality of the capital stock and excess profits taxes imposed by Sections 105 and 106 of the Revenue Act of 1935 on three grounds: (1) that Sections 105 and 106 constitute an unlawful delegation of legislative authority to the taxpayer; (2) that these sections are so arbitrary and capricious as to violate the Fifth Amendment to the Constitution; and (3) that the capital stock and excess profits taxes are "based on guesses and wagers" and that they are therefore beyond the delegated powers of Congress.

These very contentions, already advanced in at least 20 reported and about 500 unreported cases,¹ have uniformly been

¹ Many of these suits were voluntarily dismissed by the taxpayers after this Court denied certiorari in *Allied Agents, Inc. v. United States*, 26 F. Supp. 98 (C. Cls.), certiorari denied, 308 U. S. 561.

rejected by the circuit courts of appeals,² by the Court of Claims,³ and by the district courts;⁴ there is no decision of any court to the contrary. Petitions for certiorari were filed in six of the cases decided by the Court of Claims and by the circuit courts of appeals, seeking review by this Court of the same issues as petitioner raises in this case; all the petitions were denied.⁵ In addition, this Court, in *Haggar Co. v. Helvering*, 308 U. S. 389, discussed and construed the very sections of the Revenue Act here in issue without expressing any doubt concerning their validity. We believe that the uniform decisions

² *Rochester Gas & Electric Corp. v. McGowan*, 115 F. (2d) 953 (C. C. A. 2); *American Viscose Corp. v. Rothensies*, 121 F. (2d) 186 (C. C. A. 3); *Utah Oil Refining Co. v. Hinckley*, 121 F. (2d) 578 (C. C. A. 10); *Prime Securities Corp. v. United States*, 119 F. (2d) 993 (C. C. A. 6), certiorari denied October 13, 1941, Nos. 337-342, present Term; *Briggs-Darby Const. Co. v. Commissioner*, 119 F. (2d) 89 (C. C. A. 5). In the present case, the Second Circuit also sustained the validity of the excess profits tax on the authority of its own earlier decision in *Rochester Gas & Electric Corp. v. McGowan*, *supra*.

³ *Allied Agents, Inc. v. United States*, 26 F. Supp. 98 (C. Cls.), certiorari denied, 308 U. S. 561; *Tennessee Consolidated Coal Co. v. United States*, 89 C. Cls. 542, certiorari denied, 310 U. S. 649; *Chicago Telephone Supply Co. v. United States*, 23 F. Supp. 471 (C. Cls.), certiorari denied, 305 U. S. 628; *Servel, Inc. v. United States*, 35 F. Supp. 466 (C. Cls.), certiorari denied *sub nom. General Motors Corp. v. United States and United Motors Service, Inc. v. United States*, 312 U. S. 708.

⁴ *Rosoff Tunnel Corporation v. Higgins*, 28 F. Supp. 880 (S. D. N. Y.); *Midvale Paper Board Co., Inc. v. United States*, 31 F. Supp. 851 (S. D. N. Y.); *Mountain Iron Co. v. United States*, 31 F. Supp. 895 (D. Minn.); *Stromberg-Carlson Mfg. Co. v. McGowan*, 32 F. Supp. 101 (W. D. N. Y.); *Hornell Ice & Cold Storage Co. v. United States*, 32 F. Supp. 468 (W. D. N. Y.); *Isthmian S. S. Co. v. United States*, 33 F. Supp. 1007 (D. Del.); *Kentucky Fire Brick Co. v. Glenn*, 34 F. Supp. 35 (W. D. Ky.); *American Viscose Corporation v. Rothensies*, 34 F. Supp. 217 (E. D. Pa.); *Lake Terminal R. Co. v. United States*, 34 F. Supp. 963 (N. D. Ohio); *Stanolind Oil & Gas Co. v. Jones*, 34 F. Supp. 965 (W. D. Okla.); *United States Steel Products Co. v. United States*, 36 F. Supp. 368 (D. N. J.). In addition, there are innumerable District Court decisions to the same effect in which either the opinion is not reported or no opinion was rendered.

⁵ *Allied Agents, Inc. v. United States*, certiorari denied, 308 U. S. 561; *Tennessee Consolidated Coal Co. v. United States*, certiorari denied, 310 U. S. 649; *Chicago Telephone Supply Co. v. United States*, certiorari denied, 305 U. S. 628; *General Motors Corp. v. United States*, certiorari denied, 312 U. S. 708; *United States Motors Service, Inc. v. United States*, certiorari denied, 312 U. S. 708; *Prime Securities Corporation v. United States*, Nos. 337-342, present Term, certiorari denied October 13, 1941.

of the lower federal courts are patently correct and that no serious argument can be made to the contrary.

1. Section 105 imposes an excise tax upon every domestic corporation of \$1 for each \$1000 of the adjusted declared value of its capital stock. The adjusted declared value of the capital stock for the first year is the value declared by the corporation in its first return under the section; the adjusted declared value for subsequent years is the original declared value as changed by certain prescribed capital adjustments occasioned by increases or decreases of capital occurring after the date as of which the original declared value was declared.

Section 106 imposes a graduated excess profits tax upon so much of the net income of a corporation taxable under Section 105 as is in excess of 10 per cent of the adjusted declared value of its capital stock. The adjusted declared value of the capital stock for purposes of Section 106 is "determined as provided in Section 105 as of the close of the preceding income-tax taxable year."

Respondent does not and cannot contend that Sections 105 and 106 are invalid because of the subject of the taxes which they impose; it contends only that they are invalid because they establish, as the measure of both taxes, the value declared by the taxpayer in its first capital stock return.

The legislative history of Sections 105 and 106 makes clear the purpose of Congress in providing that the value declared by the taxpayer shall be the determinative factor. As we pointed out in our brief (p. 16n.) in *Scaife Co. v. Helvering*, No. 57, present Term, the earlier revenue acts had imposed a tax on the capital stock of every domestic corporation measured by "the fair average value of its capital stock". Revenue Act of 1918, Section 1000 (40 Stat. 1057). This provision caused much difficulty to both taxpayers and the Commissioner, and occasioned much burdensome litigation, because it required annual appraisal of the actual value of the capital stock of every corporation. The size of the administrative burden thus placed upon the Commissioner may be appreciated when it is realized

that more than 500,000 corporations are required to file capital stock returns each year. Because of the administrative impracticability of the tax, it was repealed in 1926. See S. Rep. No. 52, 69th Cong., 1st Sess., pp. 11-12; Hearings before House Committee on Ways and Means on H. R. 1, 69th Cong., 1st Sess., pp. 700-740; see 1 Bonbright, *Valuation of Property*, pp. 577-595. When the present capital stock tax was enacted in the National Industrial Recovery Act, the Congress sought to avoid the difficulties caused by the earlier law by changing the basis of the tax from the "fair average value" of the taxpayer's capital stock to the value "declared" for its capital stock by the taxpayer itself. The value declared by the taxpayer, as we have pointed out in our brief in the *Scaife* case, is not subject to review or revision by the Commissioner or the courts and may not subsequently be amended by the taxpayer; thus a definite base for the tax is established which involves no question of valuation and cannot occasion litigation.

In order to assure that taxpayers will declare a reasonable value for their capital stock and to guard against loss of revenue through understatements of value, Congress enacted the excess profits tax as a companion to the capital stock tax and provided that the value declared by the taxpayer for capital stock tax purposes should likewise be the basis upon which the excess profits tax was computed. The two taxes were thus made largely self-adjusting: a low declaration of value, although decreasing the capital stock tax, increased the risk of a high excess profits tax, while a high declaration of value, although decreasing the tax on excess profits, correspondingly increased the capital stock tax. See *Haggar Co. v. Helvering*, 308 U. S. 389, 391-392, 394.

The relation between the two taxes is clearly set forth in the report of the Senate Finance Committee (S. Rep. No. 114, 73rd Cong., 1st Sess., p. 6):

Section 214 provides for a new tax similar in principle to the capital stock tax which was levied from 1916 to 1926. In order to avoid controversy as to the value

of the capital stock, the tax is imposed on the value declared by the corporation. A reasonable value is, however, assured by means of an excess-profits tax imposed by Section 215 and based on the relation of the net income of the corporation to such declared value. A value for the capital stock once having been declared, such value may not be subsequently changed except for bona fide changes in the capital structure. * * *

Section 215 imposes an excess-profits tax on corporations. The primary object of this tax is to induce corporations automatically to declare a fair value for their corporate stock under section 214. The rate is 5 percent on the portion of the net income in excess of 12½ percent of the adjusted declared value of the stock of the corporation. The secondary object of the tax is to subject to a somewhat higher rate of tax abnormal profits which are out of proportion to the capital of the corporation.

See also S. Rep. No. 558, 73rd Cong., 2d Sess., pp. 6-7; Report of a Subcommittee of the House Committee on Ways and Means on the Proposed Revision of the Revenue Laws, 1938, 75th Cong., 3d Sess., p. 57.

2. This scheme of taxation is plainly not vulnerable to attack under the Fifth Amendment. It is only in rare and exceptional circumstances that the Fifth Amendment operates as a limitation upon the taxing power (*Magnano Co. v. Hamilton*, 292 U. S. 40, 44), and then only if the challenged statute is so arbitrary or capricious as to compel the conclusion that it does not involve an exercise of the taxing power at all but constitutes a confiscation of property. *Helvering v. City Bank Co.*, 296 U. S. 85, 90; *Nichols v. Coolidge*, 274 U. S. 531. Unlike the Fourteenth Amendment, the Fifth Amendment contains no equal protection clause. While it is true that the due process clause and the equal protection clause may, within certain limits, be co-extensive, it is equally true that the equal protection clause has an independent sphere of action. It is within that

independent sphere that such questions as uniformity, other than the territorial uniformity required by Article I, Section 8, fall. This must have been the analysis of this Court when it declared through Mr. Justice Holmes in *La Belle Iron Works v. United States*, 256 U. S. 377, 392:

The Fifth Amendment has no equal protection clause; and the only rule of uniformity prescribed with respect to duties, imposts, and excises laid by Congress is the territorial uniformity required by Art. I, § 8. * * *

See also *Steward Machine Co. v. Davis*, 301 U. S. 548, 583-585; *Quong Wing v. Kirkendall*, 223 U. S. 59, 62. Indeed, this Court has often stated, in cases involving a claim of unreasonable classification, that no Fifth Amendment question is involved. *Treat v. White*, 18¹ U. S. 264, 269; *McCray v. United States*, 195 U. S. 27, 61; *Billings v. United States*, 232 U. S. 261, 282; *Brushaber v. Union Pac. R. R.*, 240 U. S. 1, 23-24; *Barclay & Co. v. Edwards*, 267 U. S. 442, 450-451.

But even were we to assume that the Fifth Amendment contained a restriction upon federal taxation equivalent to that imposed upon the states by the Fourteenth Amendment, the validity of Sections 105 and 106 would be beyond question. There is no dispute that Congress could validly have taxed corporations, as it did in the earlier revenue acts, upon the basis of the actual value of their capital stock. See *Ray Copper Co. v. United States*, 268 U. S. 373; *Edwards v. Chile Copper Co.*, 270 U. S. 452; cf. *Flint v. Stone Tracy Co.*, 220 U. S. 107. And it is equally clear that Congress could validly have imposed an excess profits tax likewise computed upon the basis of the actual value of the corporation's capital stock. Cf. *La Belle Iron Works v. United States*, 256 U. S. 377. The capital stock and excess profits taxes here in issue are no different in substance. The corporations liable for the taxes are obviously best able to determine and declare the fair value of their own capital, which Congress intended that they should declare. See *Servel, Inc. v. United States*, 35 F. Supp. 466, 468, 469 (C. Cls.), certiorari

denied *sub nom.* *General Motors Corp. v. United States* and *United Motors Service, Inc. v. United States*, 312 U. S. 708; *Briggs-Darby Const. Co. v. Commissioner*, 119 F. (2d) 89, 91 (C. C. A. 5). If they do declare the fair value, the tax imposed upon them is precisely the same as it would have been if Congress had required such a declaration. And even if some taxpayers choose to undervalue or overvalue their capital, the fact that the capital stock and excess profits taxes are largely self-adjusting assures that the combined tax collected from all taxpayers will be reasonably uniform. The due process clause of the Fifth Amendment, if applicable at all, certainly requires nothing more. *La Belle Iron Works v. United States*, 256 U. S. 377, 392-393; *Briggs-Darby Const. Co. v. Commissioner, supra*; *Servel, Inc. v. United States, supra*; *Rochester Gas & Elec. Corp. v. McGowan*, 115 F. (2d) 953 (C. C. A. 2); *Allied Agents, Inc. v. United States*, 26 F. Supp. 98 (C. Cls.), certiorari denied, 308 U. S. 561; *American Viscose Corp. v. Rothensies*, 121 F. (2d) 186 (C. C. A. 3); *Utah Oil Refining Co. v. Hinckley*, 121 F. (2d) 578 (C. C. A. 10). Indeed, the administrative practicability of the present scheme of taxation, as compared with the impracticability of the former capital stock tax, may alone be sufficient to sustain its validity. *La Belle Iron Works v. United States, supra*; *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 511, 513.

In this connection the decision of the Circuit Court of Appeals for the Second Circuit in *Rochester Gas & Elec. Corp. v. McGowan*, 115 F. (2d) 953, upholding the constitutionality of the capital stock tax, is particularly pertinent. The court stated (p. 955)

In any year in which the "declared value" overshot the mark, the taxpayer would indeed pay a greater tax than it need, but only upon one-tenth of one per cent of the excess. In any year in which the "declared value" undershot it, the taxpayer would pay a tax of five per cent upon so much of the income as the "de-

clared value" did not cover. The second tax was the heavier and could in practice be reasonably insured against by a liberal allowance for "declared value", the course generally in fact adopted. To say that Congress could not choose a scheme implemented by such mild sanctions, as an alternative to actually computing an "excess profits tax" with all the uncertainty and litigation which that had involved, would be most unreasonably to circumscribe its powers to establish a convenient and flexible fiscal system.

It is true, of course, that isolated cases may occur where corporations somewhat similarly situated will pay different amounts of taxes, at least in the first or declaration year. But, as this Court has stated, the "difficulty of adjusting any system of taxation so as to render it precisely equal in its bearing is proverbial, and such nicety is not even required of the States under the equal protection clause, much less of Congress under the more general requirement of due process of law in taxation." *La Belle Iron Works v. United States, supra*, at 392-393. It is also true that it is difficult, if not impossible, for a corporation whose income fluctuates from year to year to declare the lowest possible capital stock valuation and still avoid excess profits taxes in any future year. But these are revenue measures and the Constitution does not require that Congress shall provide such a measure of taxation that each corporation will be enabled to declare a value which will result in the least net revenue to the Government.

The fact that the value declared for the first year is made binding for future years, with adequate adjustment for any *bona fide* change in the capital structure of the corporation, does not render the tax invalid. In view of the administrative considerations and the compensation in the operation of the excess profits tax, it can hardly be deemed arbitrary to permit the declared value to stand, subject to suitable adjustments,

at least for a short period.* On this aspect of the case, the decision in *La Belle Iron Works v. United States*, 256 U. S. 377, is conclusive. There this Court considered the excess profits tax enacted during the last war, in which invested capital was defined according to the original cost of the corporation's property rather than its present value. The validity of the tax was assailed on the ground that the statute took no account of increases or decreases in the value of the property from the time of its original acquisition, and that therefore the tax was "glaringly unequal" in its impact upon corporations which, at the time of the imposition of the tax, had property of substantially the same value. This Court rejected the contention, stating (pp. 392-393):

Nor can we regard the act—in basing "invested capital" upon actual costs to the exclusion of higher estimated values—as productive of arbitrary discriminations raising a doubt about its constitutionality under the due process clause of the Fifth Amendment. The difficulty of adjusting any system of taxation so as to render it precisely equal in its bearing is proverbial, and such nicety is not even required of the States under the equal protection clause, much less of Congress under the more general requirement of due process of law in taxation. Of course it will be understood that Congress has very ample authority to adjust its income taxes according to its discretion, within the bounds of geographical uniformity. Courts have no authority to pass upon the

*Section 215 (f) of the National Industrial Recovery Act, Section 701 (f) of the 1934 Act, and Section 105 (f) of the 1935 Act, did not provide for any limitation of time upon the use of the original declared value. However, the passage of the later Acts operated in such fashion that a corporation was compelled to utilize the value declared for the previous year only in the returns for the years ending June 30, 1935, and June 30, 1937. Section 601 (f) of the Revenue Act of 1938, 52 Stat. 447, provides that the adjusted declared value shall be determined with respect to three-year periods beginning with the year ending June 30, 1938, and each third year thereafter.

propriety of its measures; and we deal with the present criticism only for the purpose of refuting the contention, strongly urged, that the tax is so wholly arbitrary as to amount to confiscation.

Respondent's suggestion (Br. 16-20) that the tax operates unfairly against many taxpayers because of the ending dates of their fiscal years is without substance. As we have pointed out, the purpose of Congress was to induce taxpayers to declare the fair value of their capital stock; determination of such fair value at any particular time obviously does not depend upon the fiscal period employed by the taxpayer. It is true that a corporation with a fiscal year ending June 30 may, instead of declaring the fair value of its capital, state a higher value which will enable it to avoid the excess profits tax for the first or declaration year, while a taxpayer, such as respondent, whose fiscal year ends on January 31, cannot with equal assurance compute the figure which will enable it to pay the lowest combined tax for the first year. But the apparent advantage which the first corporation may have for the declaration year is very apt to disappear in subsequent years when, by reason of its overstatement of capital, it must pay a higher capital stock tax than it would have had to pay if it had declared the fair value, and when its earnings are such that it would not have had to pay any excess profits tax on the basis of fair value. In any event, the fact that minor discrepancies may occur in isolated cases where the taxpayer has overvalued or undervalued its capital and where the operation of the capital stock and excess profits taxes may not be entirely successful in assuring the imposition of a combined tax reasonably equivalent to that which would have been imposed had a fair value been declared, is surely not sufficient ground for condemning the entire scheme of taxation as so arbitrary and capricious as to constitute a taking of property without due process. As the Court of Claims stated in *Allied Agents, Inc. v. United States*, 26 F. Supp. 98, certiorari denied, 308 U. S.

561, a leading case upholding the validity of the capital stock tax (p. 102):

There are many taxes as to which hypothetical cases can be made up which will present, as between taxpayers, a strong discrimination; but in actual practice the two taxes under consideration are much more likely to work out fairly and with less discrimination than the old excess-profits tax which seldom if ever operated without more or less discrimination and often compelled one taxpayer having the same amount of profits as another to pay many times more taxes than a competitor which was using no greater amount of capital.

3. Respondent's contention that the taxes are unconstitutional because based on "guesses and wagers" (Br. 20-22) merits no extended discussion. As we have pointed out, the purpose of Congress was to assure a fair declaration of value, and to that end it allowed the taxpayer, which is in the best position to ascertain such value, to make its own declaration. In order to avoid administrative difficulties, Congress made the taxpayer's declaration conclusive, using the device of the excess profits tax in place of revision by the Commissioner and the courts to guard against understatements of value. But plainly, as the lower federal courts have uniformly held, the fact that taxpayers may, if they choose, declare an arbitrary figure, rather than the fair value of their capital, in an attempt to secure the lowest possible combined tax, does not mean that the tax is based on a "guess". The taxpayer is not required to guess at anything; it may, as Congress intended it should, declare the fair value of the capital stock. If it does make a guess, it is only in trying so to fix the value that it will result in paying the lowest possible combined tax. See *Servel, Inc. v. United States*, 35 F. Supp. 466, 468 (C. Cls.), certiorari denied *sub nom. General Motors Corp. v. United States* and *United Motors Service, Inc. v. United States*, 312 U. S. 708; *Allied Agents, Inc. v. United States*, *supra*, at 103-104. Manifestly, the employment

of this administratively practicable device does not deprive the statute of its character as a revenue act and thus place it beyond the delegated powers of Congress.

4. There is likewise no substance to respondent's contention (Br. 12-15) that Sections 105 and 106 are invalid because delegating legislative power to the taxpayers. As pointed out in the *Allied Agents* case, *supra*, at 103, "nothing that the taxpayer does or can do affects anyone but itself. The corporation performs no legislative duty in making the election or choice of the amount which it will declare * * *." Nor can it be said that Congress has provided no legislative standard; the statute specifically prescribes the method by which both taxes are to be computed, the taxpayer simply being given an option in declaring the amount which forms the basis of the computation. See *Rochester Gas & Elec. Corp. v. McGowan*, *supra*; *American Viscose Corp. v. Rothensies*, *supra*; *Utah Oil & Refining Co. v. Hinckley*, *supra*.

It is true, of course, that the particular value which the taxpayer declares affects in some measure the combined capital stock and excess profits tax which it must pay; indeed, by declaring no value for its capital or by grossly overvaluing its capital, it may entirely avoid one or the other of the two taxes. But this is a frequent result of tax provisions, the validity of which is universally conceded. Thus, taxpayers may elect either the cash or accrual basis of accounting; their selection between the two may in any particular year, and even over the course of years, have a very decided effect upon their tax liability. The election given to taxpayers to choose between cost and percentage depletion is another familiar example. And, of course, taxpayers may, and constantly do, affect the amount of their tax liability by selling capital assets at particular times selected with an eye to tax advantages. As these examples demonstrate, it is immaterial that the particular value chosen by the taxpayer may have some effect upon its tax liability for a particular year; the decisive consideration is that, by the combined operation of both capital stock and excess profits taxes,

Congress has assured that, except in very unusual or extraordinary circumstances, all taxpayers, whatever value they may declare, will bear a reasonably equivalent tax burden. This being so, the act of the taxpayer in declaring the value of its capital stock cannot in any possible sense be deemed the exercise of a legislative power delegated to it by Congress.

Respectfully submitted,

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NOVEMBER, 1941

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Supreme Court of the United States
OCTOBER TERM, 1941.

No. 248.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
v.

LERNER STORES CORPORATION (Md.),
Respondent.

**BRIEF FOR THE RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT.**

✓ ANDREW B. TRUDGIAN,
Counsel for Respondent.



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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 248.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

LERNER STORES CORPORATION (Md.),
Respondent.

**BRIEF FOR THE RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT.**

Opinions Below.

The opinion of the United States Board of Tax Appeals (R. 16-18) is not reported. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 28-30) is reported in 118 F. (2d) 455.

Jurisdiction.

The decision of the United States Circuit Court of Appeals was rendered on March 24, 1941 (R. 28). The order for mandate was filed April 12, 1941 (R. 31). The petition for writ of certiorari was filed in the Supreme Court of the United States on July 8,

1941. Petitioner invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1—Whether the petition for writ of certiorari was filed within the period specified by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925?

2—Whether respondent, before the end of its income tax taxable year, may correct a figure of \$25,000, inserted on its capital stock tax return as the result of the clerical error of a subordinate employee, although the figure of \$2,500,000 was actually intended and decided upon by the respondent?

3—Whether the excess-profits tax is valid and constitutional under the Constitution of the United States of America?

Statutes and Regulations Involved.

The statutes and regulations involved are set forth in the Appendix, *infra*, pages 9-10.

Statement of Facts.

The petitioner duly filed a capital stock tax return for the year ended June 30, 1936, showing a declared value as of January 31, 1936, in the amount of \$25,000. The officer supervising the filing of the capital stock tax returns for the respondent and its fifty-two subsidiaries decided upon a declared value in the amount of \$2,500,000, and so instructed his subordinates.

However, through a clerical error on the part of a subordinate employee engaged in manually preparing the return, the \$25,000 figure was actually inserted on the return (R. 16). Upon discovery of the error prior to the expiration of petitioner's fiscal year, on January 27, 1937 the respondent filed an amended capital stock tax return showing the correct amount of \$2,500,000 (R. 17).

The Commissioner of Internal Revenue refused to accept the amended return, or to recognize the corrected declared value in the amount of \$2,500,000. In computing the ten per cent. of the declared value as of January 31, 1936, allowed as a deduction in determining the amount of the net income of the respondent subject to excess-profits tax for the fiscal year ended January 31, 1937, the Commissioner employed the declared value appearing on the first capital stock tax return, viz., \$25,000 (R. 17). This resulted in a deficiency of \$27,947.38 in excess-profits tax (R. 8).

From this determination the petitioner appealed to the United States Board of Tax Appeals, which sustained the Commissioner (R. 18), but the Circuit Court of Appeals reversed the Board (R. 31).

The Circuit Court of Appeals rendered its decision on March 24, 1941 (R. 28). At the conclusion of its decision the Circuit made the following statement (R. 30):

“Order reversed.”

The order for mandate was filed on April 12, 1941 (R. 31).

Argument.

I—This Court has no jurisdiction to grant the petition for writ of certiorari because said petition was not filed within the period specified by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

The governing statute, Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, provides that no writ of certiorari shall be entertained unless the petition is filed "within three months after the entry of such judgment or decree * * *."

The respondent contends that "the judgment or decree" is contained in the decision of the Circuit Court of Appeals, rendered on March 24, 1941 (R. 28). The decision is not merely a statement of the reasons, but embodies the "judgment" of the Court. After stating its reasons (R. 28-30), the court states unequivocally its judgment at the conclusion in the words: "Order reversed." Those words constitute unmistakably the judgment of the court, which under the rules of the court (Rule XXVI, United States Circuit Court of Appeals, Second Circuit) "shall, immediately upon the delivery thereof, be handed to the clerk to be recorded." Presumably the recording or entry of the judgment or decision was made on March 24, 1941, the date on which the decision was delivered. At any rate the petitioner, upon whom the burden of establishing jurisdiction rests, does not show that the recording required by the Rules was made subsequent to March 24, 1941. Hence the three month statutory limitation expired on June 24, 1941, which was prior to July 10, 1941, the date upon which the petition was filed.

Webster's New International Dictionary of the English Language (1932) gives the following definitions (italics supplied):

Judgment—

- “1. The pronouneing of an *opinion* or *decision* of a formal or authoritative nature; also, the *opinion* or *decision* given.
- 2. Law. The act of determining, as in courts, what is conformable to law and justice;
* * *.”

Entry—

- “2. Act of making or entering a *record*.”

Enter—

- “7. To inscribe; enroll; *record*; * * *.”

Decree—

- “1. An *order* or *decision* from one having authority *deciding* what is, or is to be, done; a *determination* by one having power *de iding* what is to be done or to take place; authoritative *decision*; * * *.
- 4. Law. A judicial *decision* * * *.”

Clearly on March 24, 1941 the court pronounced its “judgment” or “decrees.” Rule XXVI, *supra*, refers to it as an “opinion”. The record states that it was “decided” on March 24, 1941 (R. 28). It concludes with the words “Order reversed,” indicating clearly that a determination has been made. These words are themselves the judgment or decree of the court.

Just as clearly the judgment or decree was “entered” or, as Rule XXVI provides, “recorded” by

the clerk prior to the date of entry of the "Order for Mandate." The Order for Mandate is provided for by Rule XXX, which is entirely separate and distinct from the "recording" or "entry" provided for by Rule XXVI. Therefore, the three month statutory period does not run from the entry of the Order for Mandate, but from the date of the entry or recording of the opinion or decision.

II—The decision below is not in conflict with the decisions in *William B. Scaife & Sons Co. v. Commissioner*, 117 F. (2d) 572 (C. C. A. 3rd, 1941) and *Riley v. Commissioner*, 311 U. S. 55 (1940).

The *Scaife* case did not involve a clerical error of a subordinate employee. Neither the opinion of the Third Circuit nor of the Board of Tax Appeals indicate that the error was a clerical error rather than an error of judgment or discretion on the part of the treasurer. The treasurer, who committed the error in preparing the return, was a responsible officer who was vested with power to prepare the return alone. *U. S. Treas. Reg. 64 (1936 Edition) Article 36*. It does not appear that the treasurer, intending to insert the \$1,000,000 figure, inserted the \$600,000 figure as the result of a clerical error. The published opinions do not indicate that any evidence was introduced to the effect that the error of the treasurer was not an error of judgment. In the instant case, on the other hand, there is no dispute as to the nature of the error. As the lower court stated:

"But we are not confronted with a change of judgment by the taxpayer; the case at bar presents a situation where the taxpayer has made but one 'declaration of value' and has inae-

curately reported it to the Commissioner due to an error of one of its employees. The correction of such a clerical error before the Commissioner has acted in reliance upon it in computing taxes for a later year cannot thwart the purposes of the statute or injure the interests of the Government."

The distinction between the *Scaife* case and the instant case, *i. e.*, the distinction between an error of judgment and a clerical error, is adverted to by the court below:

"* * * the amendment must not be used to substitute a declared valuation more favorable in the light of later events than the one originally decided upon and reported by the taxpayer. See *Riley Co. v. Commissioner*, 311 U. S. 55, 59. But granted that the valuation stated in the return was due to a clerical error, we think no sound reason can be advanced for not permitting it to be corrected before the Commissioner has acted in reliance on it. Not to do so deprives the taxpayer of the privilege the statute accords to exercise its own judgment in fixing the taxable base."

The court below also effectively disposes of the respondent's contention that its decision is in conflict with the *Riley* case. As the court stated:

"This case [*Riley v. Commissioner*] would be apposite if the petitioner at bar were attempting by amendment to change its judgment of the value to declare for its stock. It is not controlling where the amendment seeks to correct a clerical error in the return. Mr. Justice Douglas

was careful to state at page 58, 'We are not dealing with an amendment designed merely to correct errors and miscalculations in the original return. Admittedly the Treasury has been liberal in accepting such amended returns even though filed after the period for filing original returns.' * * *'

In conclusion, it may be pointed out that the decision below presents no question of importance. The facts, relating to a purely clerical error of a subordinate employee, present a highly unusual and novel situation which is not likely to recur.

CONCLUSION.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

**JUDICIAL CODE. SECTION 240 (a), AS AMENDED BY THE
ACT OF FEBRUARY 13, 1925.**

No appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor is made within six months. * * *

**UNITED STATES TREASURY REGULATIONS 64 (1936
EDITION), ARTICLE 36.**

Verification of return.—The return, as well as any separate statement submitted herewith, must be verified under oath or affirmation by at least one of the responsible officers of the corporation, and preferably by the president and the treasurer. * * *

**RULES OF UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

Rule XXVI. Opinions of the Court.

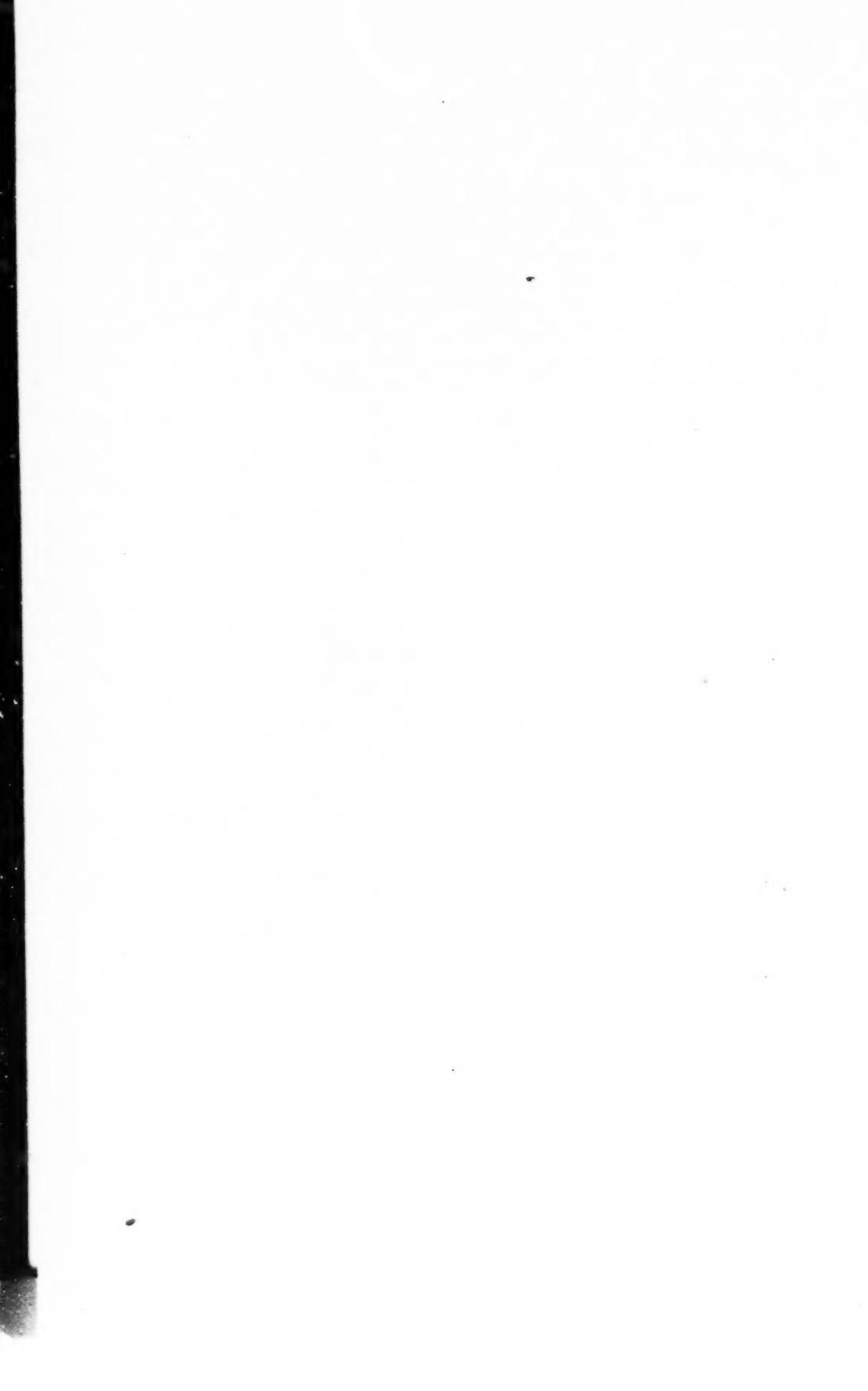
1. All opinions delivered by the Court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.
2. The original opinions of the Court shall be filed with the clerk of this Court for preservation.
3. Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more

volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

Rule XXX. Taxing Costs—Order—Mandate.

1. Upon the filing of any decision by this Court the clerk shall forthwith, or at any later time, if the court thinks justice requires it, enter the proper order, and will thereupon prepare and tax the bill of costs, giving to the parties reasonable time to file with him their proposed orders and bill of costs, with proof of service of the same upon their opponents.

2. A mandate may issue at any time on order of this court, but unless otherwise ordered shall issue at the expiration of fifteen days from the filing of the opinion of this court in the clerk's office unless delayed by the filing of the petition for rehearing. * * *



**BRIEF FOR THE
RESPONDENT**



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CHARLES ELMORE CHAPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 248.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

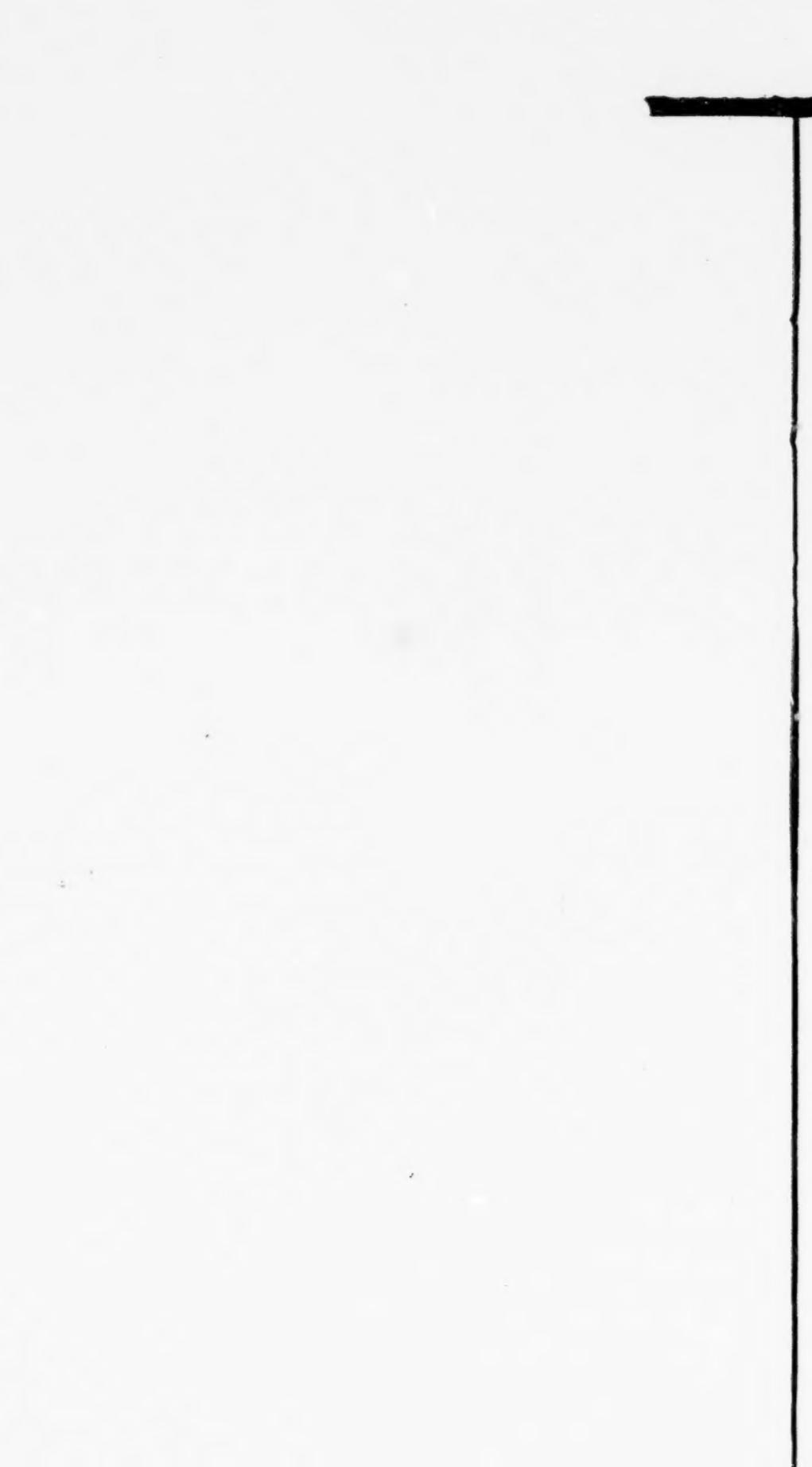
v.

LERNER STORES CORPORATION (Md.),
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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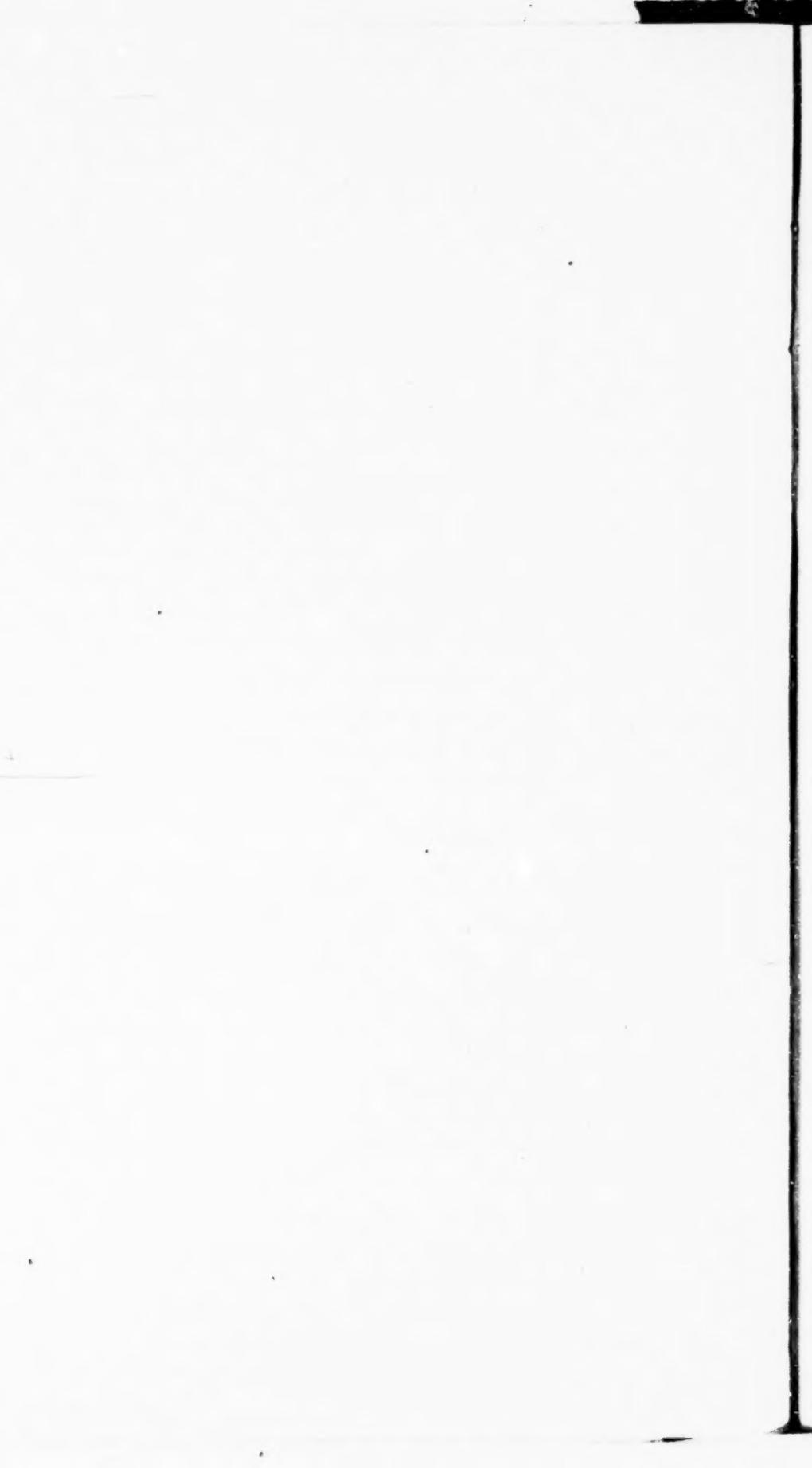
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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 248.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

LERNER STORES CORPORATION (Md.),
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

Opinions Below

The opinion of the United States Board of Tax Appeals (R. 16-18) is not reported. The opinion of the United States Court of Appeals for the Second Circuit (R. 28-30) is reported in 118 F. (2d) 455.

Jurisdiction

The judgment of the United States Circuit Court of Appeals was entered April 12, 1941 (R. 31). The petition for a writ of certiorari was filed on July 8, 1941, and was granted October 13, 1941. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

- (1) Whether the taxpayer, which filed a timely capital stock tax return for the year ended June 30, 1936, showing, as the result of a clerical error by an employee, a declared value of \$25,000, had the right to file on January 27, 1937, before the end of its income tax year, February 1, 1936-January 31, 1937, an amended return correcting its declaration to \$2,500,000?
- (2) Whether the Excess Profits Tax imposed by Section 106 of the Revenue Act of 1935, as amended by Section 402 (a) of the Revenue Act of 1936, was constitutional under the Constitution of the United States of America.

Statutes and Regulations Involved

The pertinent statutes and regulations are set forth in the appendix, *infra*, pages 23 to 28.

Statement

Taxpayer was the owner of fifty-two subsidiary companies and its income consisted of dividends from the latter. It was granted an extension of time to September 29, 1936, within which to file its capital stock tax return for the year ended June 30, 1936. Pursuant to that extension, on September 27, 1936, it filed a capital stock tax return in which it declared a value of \$25,000.00 for its capital stock. In the computation of tax on that return, the tax due was reported as \$25.00 and the interest was reported as twenty-five cents, making a total of \$25.25. The return was signed by J. H. Hersch and Graham Magee.

both of whom were vice-presidents of taxpayer, and was duly sworn to by them under oath (R. 16).

The figure of \$25,000.00 entered on the return was erroneous; the error arose through a mistake made by an employee of the taxpayer (R. 16).

On January 27, 1937, taxpayer forwarded a document prepared on Form 707 (the capital stock tax return form), which was stated to be an amended capital stock tax return for the year ended June 30, 1936. Under item 8 of this form, opposite the words "Declared Value of Entire Capital Stock", the figure \$2,500,000.00 was entered. The amount of tax, penalty and interest computed by the taxpayer on the form was \$3,090.00, consisting of a tax of \$2,500.00, a penalty of \$500.00, and interest of \$90.00 (R. 17).

The mistake in the first return was discovered by Hersch in the course of going over taxpayer's accounts prior to the end of taxpayer's fiscal year, which ended January 31, 1937 (R. 17).

By letter dated July 12, 1937, the Commissioner advised the taxpayer that the declaration of value on the document sought to be filed as an amended return could not be accepted. The amount of money paid in connection with the amended return was refunded to the taxpayer (R. 17).

In computing the deduction of 10% of the declared value of the taxpayer's capital stock in determining taxpayer's net income subject to the excess profits tax for the fiscal year ended January 31, 1937, the Commissioner employed the declared value of \$25,000.00 appearing on the first capital stock return (R. 17). On this basis he determined a deficiency of \$27,947.38 in excess profits tax (R. 8). The Board of Tax Appeals sustained this action of the Commissioner (R. 18), but the Circuit Court of Appeals reversed (R. 31).

Summary of Argument

The erroneous figure of \$25,000.00 resulted from a clerical mistake, not an error of judgment and accordingly was not an acceptance of the offer tendered by Section 105 of the Revenue Act of 1935 to declare a desired value. Under the general law of contracts this inadvertent mistake of an employee was not binding and the general law was not altered by any act of Congress because no expression of such a harsh intent is to be found in the statute.

The intent of the statute was to allow a taxpayer to choose its base for the first taxable year and the amount thus fixed was to be accepted, with such changes as the statute prescribed, for the purpose of computing capital stock and excess profits taxes in following years. What was declared in the first year was immaterial, taxpayers being given the widest election. The choice was to be made in the return filed for the first year, such return not being limited to the first piece of paper filed for the year, but including a timely amended return. A timely amended return would include one filed before the end of the first income and excess profits tax year ending after the capital stock declaration year.

The excess profits tax imposed by Section 106 of the Revenue Act of 1935, as amended, and the related capital stock tax imposed by Section 105 of the Revenue Act of 1935, as amended, are unconstitutional as constituting an unlawful delegation of legislative authority to taxpayers contrary to Article 1, Section 8 of the Constitution of the United States of America; also because the operation of these sections are so arbitrary and capricious as to violate the Fifth Amendment of the Constitution, and to be

entirely in violation of its spirit and intent with the result that the power to enact such legislation was never granted to Congress.

Argument

I.

The taxpayer is not bound by the clerical error resulting in the statement of an erroneous value.

As stated by the Court in the case of *Patch v. White*, 117 U. S. 210:

"Dr. Johnson, in the preface to his Dictionary well says: 'Sudden fits of inadvertence will surprise vigilance, slight avocations will seduce attention, and casual eclipses of the mind will darken learning.' Not to allow the correction of such evident slips of attention, when there is evidence by which to correct it, would be to abrogate the old maxim of the law: '*Falsa demonstratio non nocet.*'"

The courts have always felt the necessity of the application of this doctrine with respect to themselves and permitted the correction of clerical errors in relation to their proceedings *nunc pro tunc*. *St. Louis & S. F. R. Co. v. Spiller*, 275 U. S. 156; *Marsh v. Nichols, S. & Co.*, 128 U. S. 605, 615; *Wetmore v. Kerrick*, 205 U. S. 141. They have also recognized its necessity in the case of inadvertent descriptions in deeds of property, *Williams v. United States*, 138 U. S. 514; *Camp v. Boyd*, 229 U. S. 530; *Morrison v. Stalnaker*, 104 U. S. 213; references to the wrong statute, *Johnson Co. Comrs. v. January*, 4 Otto (94

U. S.) 202; and errors in wills, *Patch v. White*, 117 U. S. 210.

So far as contracts are concerned, as stated in the Restatement, Contracts, Section 502:

*** * * where parties on entering into a transaction that affects their contractual relations are both under a mistake regarding a fact assumed by them as the basis on which they entered into the transaction, it is voidable by either party if the enforcement of it would be materially more onerous to him than it would have been had the fact been as the parties believed it to be * * *

and again in Section 502 of the Restatement, under "Comment":

(a) * * * Where both parties assume the existence of a certain state of facts as the basis on which they enter into a transaction, the transaction can be avoided by a party who is harmed, if the assumption is erroneous. It is immaterial whether the mistake affects identity of persons or things, or the attributes of either persons or things, or other facts. It is the assumed existence of the fact to which the mistake relates as the basis on which the parties bargained, that is important.

Also 5 Williston on Contracts (Rev. ed. 1936), Section 1547:

"Where a written agreement is not in conformity with the actual intention of the parties in a material matter, a court of equity will reform the writing in accordance with that intention if innocent parties will not be affected thereby."

The taxes imposed by Sections 105 and 106 of the Revenue Act of 1935 resulted in contracts with tax-payers. Under these sections tax-payers were given the choice of methods of taxation and the acceptance of one precluded to a more or less extent the application of the other. If the taxpayer would pay the government a sufficient consideration under Section 105 it would not be taxed under Section 106. That this is so is established by the following quoted from the "Report—Senate Finance Committee" (73rd Cong., 1st Sess. S. Rept. 114) on Sections 215 and 216 of the National Industrial Recovery Act, 48 Stat. 195, imposing the first capital stock and excess profits taxes of the type imposed by Sections 105 and 106 of the Revenue Act of 1935:

"Section 214 provides for a new tax similar in principle to the capital stock tax which was levied from 1916 to 1926. In order to avoid controversy as to the value of the capital stock, the tax is imposed on the value declared by the corporation. A reasonable value is, however, assured by means of an excess profits tax imposed by Section 215 and based on the relation of the net income of the corporation to such declared value.

* * *

Section 215 imposes an excess profits tax on corporations. The primary object of this tax is to induce corporations automatically to declare a fair value for their corporate stock under Section 214."

But while a return under Section 105 normally would have resulted in a contract this did not happen with respect to the present taxpayer by reason of its

declaration of \$25,000.00 because of the principles of the law of contracts quoted above. The mistake made vitiated such declaration and the situation fell exactly within the scope of the above quoted doctrines. The mistake made was most material, the entire burden thereof fell upon the present taxpayer and the mistake was mutual. It was mutual because on the Government's side there was a failure to accomplish what the Government desired, the declaration of a value satisfactory to the taxpayer, *Haggar Co. v. Helvering*, 308 U. S. 389; and on the taxpayer's side, a failure to declare the value intended by the taxpayer.

Nor were the above general doctrines of contract modified in the instance of Sections 105 and 106 by Federal statute. This is so because the adoption of such a harsh, inequitable, and arbitrary rule as not permitting the correction of an inadvertent error cannot be imputed to Congress in the absence of some definite expression of intention on its part, or in the legislative record, and such is not to be found. 1 Paul and Mertens, Federal Income Taxation (1934), Section 3.05, states this rule of reasonable construction as follows:

"It has become well-established that statutes should be given a reasonable interpretation and read in a 'practical' and 'sensible' light. What is meant by the word 'reasonable' in this connection, it is almost impossible to say. Generally speaking, an unreasonable result is one which leads to hardship, injustice, or absurdity * * *."

In Sharswood's Blackstones Commentaries, Volume 1, Section 2, page 60 is stated the following famous

instance when a reasonable construction of legislative enactment was adopted:

"Therefore the Bolognian law, mentioned by Puppendorf, (b) which enacted 'that whoever drew blood in the streets should be punished with the utmost severity', was held after long debate not to extend to the surgeon who opened the vein of a person that fell down in the street with a fit."

That the doctrine is particularly applicable with respect to Federal tax laws appears from the following language of this Court in *Gould v. Gould*, 245 U. S. 151, holding:

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations * * *"

So here, it is submitted that the words of the statute, fairly read in the light of the purpose disclosed by its terms, do not require the harsh and incongruous result of refusing to allow the correction of a clerical error honestly made. Attention may also be called to *Allied Agent, Inc. v. U. S.*, 26 F. Supp. 98, where the court indicated that the present case involving an honest clerical error, may well require a decision favorable to the taxpayer. In deciding adversely to the taxpayer in that case, the court said:

"It will be observed that the petition does not allege that an honest mistake was made in any of the returns under consideration * * *."

II.

A taxpayer may elect to declare any value it sees fit in a timely amended return, and a return before the end of its first income tax year ending after the declaration year is timely.

In *Haggar Co. v. Helvering*, 308 U. S. 389, treating of Sections 215 and 216 of the National Industrial Recovery Act of 1933, 48 Stat. 195, 207, the original source of the type of capital stock and excess profits taxes imposed by Sections 105 and 106 of the Revenue Act of 1935, it was held:

"The 'first return' as the context shows is the return for the first tax year of the taxpayer and the characterization of the return as 'first' is obviously used to distinguish the return made for the first year from the return 'for any subsequent year'. * * *"

In the *Haggar* case the Court also stated:

"* * * the Commissioner concedes that the amount of the declared value of capital fixed for the first year is a matter of indifference to the Government * * *."

and again,

"Here the purpose of the statute is unmistakable. It is to allow the taxpayer to fix for himself the amount of the taxable base for purposes of the computation of the capital stock tax, but with the proviso that the amount thus fixed for the first taxable year shall be accepted, with only such changes as the statute prescribes for the

purpose of computing the capital stock and excess profits taxes in later years. Congress thus avoided the necessity of prescribing a formula for arriving at the actual value of capital for the purpose of computing excess profits taxes, which had been found productive of much litigation under earlier taxing acts * * *."

Also

"but since the declared value for the first year is a controlling factor for the computation of taxes for later years, the statute provides that the declaration once made cannot be amended."

Moreover, the Court clearly recognized the effectiveness of an amended return in stating:

"Section 215 nowhere mentions amendment of returns or amended returns. It speaks of 'declared value' for the first tax year and provides that the 'declaration of value' cannot be amended. The 'declaration of value' is that of the corporation in its 'first return under this section.' The 'first return' as the context shows is the return for the first tax year of the taxpayer and the characterization of the return as 'first' is obviously used to distinguish the return made for the first year from the return 'for any subsequent year' in which the 'adjusted declared value' is required by the same section to conform to a formula based on the 'declared value' for the first year and which, for that reason, 'cannot be amended.'

"'First return' thus means a return for the first year in which the taxpayer exercises the privilege of fixing its capital stock value for tax

purposes, and includes a timely return for that year. * * *

To quote once more:

"A timely amended return is as much a 'first return' for the purpose of fixing the capital stock value in contradistinction to returns for subsequent years, as is a single return filed by the taxpayer for the first tax year."

So far as a timely return is concerned it is submitted that a return filed before facts pertaining to an income tax year succeeding the first income tax year were ascertained is timely regardless of the fact that it was filed after the due date. Such amended return was unaffected by the facts and figures of another year and, therefore, did not violate the legislative intent of keeping the years separate. Under the statute the declaration for the first year was to be the basis for succeeding years and not to be amended therein. So long, therefore, as the facts and figures of a succeeding year had not come into existence so that a declaration of the first year in an amended return was not in effect an amended declaration in the following period the amended return was timely.

III.

The capital stock and excess profits taxes imposed by Sections 105 and 106 of the Revenue Act of 1935, as amended, were invalid and unconstitutional under the Constitution of the United States of America.

1—Sections 105 and 106 of the Revenue Act of 1935, as amended, constitute an unlawful delegation of legislative authority contrary to Article 1, Section

8 of the Constitution of the United States of America.—The capital stock tax under Section 105, as stated in the law itself, was an excise tax and being an excise tax, under Section 8 of Article I of the Constitution had to be uniform throughout the United States. As specifically provided in paragraph (d) of Section 105, all provisions of law (included penalties) applicable in respect of the excise taxes imposed by Section 600 of the Revenue Act of 1926, so far as not inconsistent, were applicable to this excise tax. Returns of this excise tax had to be filed and were subject to the same provisions of law as excise returns under Title II of the Revenue Act of 1926.

On the other hand the excess profits tax under Section 106 was most clearly an income tax imposed on net income for the income year at two different rates for different brackets of income. In addition all provisions of law (including penalties) applicable with respect to the income tax imposed by Title I, the income tax title, of the Revenue Act of 1934, as amended, applied with respect to this tax. This tax, if it were not unconstitutional on other grounds, needed the authority of the Sixteenth Amendment of the Constitution for its existence. There was, of course, no rule of uniformity governing its operation as in the case of excise taxes.

Since under Sections 105 and 106 there were two distinct types of taxes, taxpayers were given the option of imposing on themselves a direct tax or an indirect tax as they desired. A taxpayer might declare no value for capital stock and thus elect the excess profits tax; or it might declare a tremendously large capital stock value and insure no imposition of excess profits tax; or it might by a medium declaration elect to pay both capital stock and excess profits taxes.

But under the Constitution of the United States the imposition of taxes is a function of Congress not to be delegated and any delegation thereof is unconstitutional. Article I, Section 8 of the Constitution confers on Congress alone the power to lay and collect taxes, and it is a fundamental principle that Congress may not delegate its legislative authority. See Black, American Constitutional Law (3rd ed.), 373 *et seq.*; *Field v. Clark*, 143 U. S. 649, 692; *Panama Refining Co. v. Ryan*, 293 U. S. 388; *United States v. Grimaud*, 220 U. S. 506.

Possibly the argument might occur that Congress had imposed both a capital stock tax and an excess profits tax on all corporate taxpayers and merely granted a credit in the case of the direct tax (excess profits) which would eliminate that tax in whole or part. But if Sections 105 and 106 are analyzed this argument fails. Upon careful reading of these sections it is found that for the first capital stock tax year the taxpayer could elect not to be taxed by declaring "none" as its capital stock value. In this way it would not have imposed a capital stock tax on itself for that year, but would have imposed excess profits tax on any net income it might realize for its first income year and, if there was income in the following years, on the income of such years. Or it could have declared a value so high that it would never have to pay any excess profits tax, but would have imposed on itself for all times a capital stock tax. Here there was no mere granting by Congress of a credit or deduction. Congress, on the other hand, had delegated to taxpayers the imposition of tax on themselves by giving them, in the case of the capital stock tax, the right to say whether there should be a tax and in the case of the excess profits tax whether or not there

should be a credit and, therefore, whether or not there should be an excess profits tax.

And here one of the evil possibilities of this type of delegated taxation must be pointed out. In this connection let it be supposed that a taxpayer is given the choice of one of two tax laws and there is selected the one that is unconstitutional. This would have been the case if there had been a tie-up of the income tax law and the Agricultural Adjustment Act and a taxpayer had selected the latter. Such a taxpayer would not have been taxed because it did not choose to levy a tax on itself. Moreover, this would have been the case if Sections 105 and 106 had existed before the adoption of the Sixteenth Amendment and a taxpayer had chosen Section 106. Therefore, while it may be of the greatest advantage from the viewpoint of convenience to link two laws, as was done in the case of Sections 105 and 106, for the purpose of securing the easy collection of the tax Congress desires to impose, nevertheless it is a dangerous system because it admits of taxpayers avoiding the tax that Congress primarily desires to levy.

2—Sections 105 and 106 of the Revenue Act of 1935 are so arbitrary and capricious as to violate the Fifth Amendment of the Constitution of the United States of America.—The excess profits tax, considered together with its related capital stock tax, is arbitrary and capricious in that it places a premium on the good luck or ability of the taxpayer to predict the amount of net income it will earn in the future. The taxpayer with less ability as a guesser, or in some instances, with less business acumen or opportunity, is heavily penalized and must bear a heavier burden than its more fortunate or able rival. In *Brushaber v.*

Union Pacific Railroad, 240 U. S. 1, 24-25 (1915), the Court recognized the invalidity of a tax which

"was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

See also:

Tyler v. United States, 281 U. S. 497, 504.

The statute likewise produces gross inequality in its effect on those businesses which involve more risks, and wider fluctuation in the amount of income. The more speculative business pays a higher rate of tax, either in the form of a greater capital stock tax paid for protective purposes, or in the form of a greater excess profits tax. On the other hand, the business with a steady flow of income bears a smaller tax burden because it knows, with a greater degree of accuracy, the amount of income it will earn.

Moreover, the tax operates unfairly against many taxpayers because of the ending dates of their fiscal years. Solely because the taxpayer herein has a fiscal year ended January 31st, it must bear a greater tax burden than one on the calendar year basis. This is because under Section 105 the capital stock tax is due on the same date for all corporations, regardless of their income tax taxable year. The capital stock tax returns for the year ended June 30, 1936 were due in the case of those who obtained the utmost limits of

extension on September 29, 1936, and at that time a corporation on a calendar year basis would have completed seven months of its income tax taxable year; whereas the petitioner, with an income tax taxable year ended January 31, 1937, would have completed only six months of its taxable year. The calendar year corporation would, therefore, be in a much better position to estimate the amount of its income as a guide in determining its capital stock declaration than the present taxpayer. The following types of situation, which are only a few of those that exist, amply illustrate the arbitrariness and capriciousness of the law:

Type I

Corporation A had an income-tax taxable year ended July 31, 1936. As provided in Section 105 (d) of the Revenue Act of 1935, as amended, it filed on July 31, 1936 a capital stock tax return as of June 30, 1936. It was able to declare a sufficient value to eliminate excess profits tax for the income tax year ended July 31, 1936, because when the capital stock return was filed it knew the results for its income tax year.

On the other hand the income year of Corporation B ran from July 1, 1936 to June 30, 1937. Under the law the declared value as of June 30, 1936 would be the basis of its excess profits tax credit for the year ended June 30, 1937. But B was in a most difficult situation. The "times" were uncertain and there were no operating results to guide the making of proper declaration. All B could do was to guess or wager in making a declaration.

Type II

Corporation A had an income year ended September 30, 1936. As provided in Section 105 (d) the Commissioner might extend the time for making returns for not more than 60 days. The declared value in the capital stock return of "A" as of June 30, 1936 was the basis of its excess profits credit for its year ended September 30, 1936. A obtained an extension of 60 days for filing its capital stock tax return as of June 30, 1936. Accordingly when it filed such return on September 29, 1936, it knew what value to declare because it knew the results of its income year ended September 30, 1936.

Corporation B had an income-tax taxable year ended January 31, 1937. It obtained a sixty-day extension for filing its capital stock tax return for the year ended June 30, 1936, the value declared in which was the basis for its excess profits credit for the year ended January 31, 1937. But when on September 29, 1936, it filed its capital stock tax return as of June 30, 1936, it could not guess what would be the results of its operations for the months of October, 1936 to January 31, 1937, inclusive, the most important operating months of its income year. Moreover, the "times" were "panicky" and previous experiences were no guide. All that Corporation B could do, therefore, was to make the wildest kind of a guess or wager in declaring its value.

Type III

Corporation A and B, both in the same type of business, had income-tax taxable years ended August 31, 1936. Both applied for 60 day extensions for filing

capital stock tax returns as of June 30, 1936, the declared values in which were to be the bases of their excess profits credits for their years ended August 31, 1936. Corporation A obtained its extension because its auditor was ill but the request of Corporation B was refused and it had to file its return on July 31, 1936, a month before the end of its income year. It made its declaration of value on the basis of past experience but because of an inventory condition in August, 1936 such value was wrong and excess profits tax resulted. Corporation A, however, while it experienced the same inventory condition did not file its capital stock return until September 29, 1936, a month after the close of its income year. It accordingly knew the effect of the inventory situation and was able to declare properly.

Type IV

Corporation A has income consisting in large part from dividends. Corporation B is engaged in an ordinary mercantile business. Corporation B is in a good position to estimate its net income, since the business is within its control and under its management. Corporation A, on the other hand, has no control over the management of the corporation from whom it receives dividends. It has no close source of information as to the expected profit of these corporations. The declaration of dividends is subject to the judgment or caprice of directors not under its control. Unlike Corporation B, it is in no position to estimate accurately its earnings for the ensuing year.

While these instances are sufficient to prove the unconstitutionality of Sections 105 and 106, it is felt

necessary to mention the fact that a taxpayer which filed no return until discovered could occupy a more favorable position from a tax point of view than the taxpayer who guessed wrong, or made mistakes, but filed on time and tried to obey the law. The latter would have sufficient knowledge to declare a value which would prevent the imposition of excess profits tax and, though there might be a 50% penalty and interest due because of its delinquency, the capital stock tax, penalty, and interest would not equal the excess profits tax and interest of the taxpayer who did its best but made a mistake.

3—Sections 105 and 106 of the Revenue Act of 1935 are unconstitutional, the so-called taxes levied thereunder being based on guesses and wagers and there being no authority delegated to Congress to pass such laws.

Sir William Blackstone in his commentaries refers to

"Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare the people." Sharswood's Blackstones Commentaries, Volume I, Sect. 246.

While the script of Sections 105 and 106 is clear enough, they and all capital stock laws that require the fixing of a capital stock tax base today for all times are equally as ensnaring. How can a taxpayer today fix a value to cover the unexpected happenings of future years. This, of course, has been and will be impossible and the court is requested to take judicial notice of the uncertainties of the period during which

the country has been passing and the wide and unexpected results in operations arising from inventory fluctuations and other factors.

Sections 105 and 106 merely afford the taxpayer an opportunity to wager on an entirely fortuitous event, the amount of income it will earn. A reading of the Constitution nowhere reveals any authority for the raising of national revenue by a wager whether on the throw of dice, the turn of a wheel, or gambling on some future happening. True Congress has plenary power to tax, but no power to enact legislation of this type. Certainly the Government has no authority to provide that one of its principal officers must roll dice with taxpayers and, if the Government wins, to collect the results. Nor has it power to enact the so-called taxes included under Sections 105 and 106, which equally call for wagers except that the dice game would be fairer as all would be left to chance, and there would be no favoring of a few who are in a favored position in playing the wheel of capital stock and excess profits tax.

As to a claim that the scheme of these taxes is desirable and proper because they merely simplify the administration of a capital stock tax law by preventing the disputes as to true value that arose under former capital stock tax laws, the answer is plain. There would be validity to such a contention if an annual declaration of value had been permitted to taxpayers. If the tax were imposed on actual value such value would differ at the different tax dates. A true substitute for this type of law would at least admit of annual declarations. But on the other hand taxpayers were to declare values for all time and the tax was to apply on such adjusted declared values although they

might come to represent no reasonable values at all because of the disappearance or depreciation of assets behind them. It is submitted that there is no where a grant to Congress under the Constitution to tax nothing but an amount written on a piece of paper some years before. Congress may tax persons, things or transactions without limit, but surely it does not have the right to tax in later years the remaining balance of a wild guess or figment of the imagination.

While it is recognized that acts of the National legislature are only to be held unconstitutional where there is not the slightest doubt as to their unconstitutionality, it is urged that such is the situation with respect to Sections 105 and 106. It is, moreover, submitted that the lawful objects of taxation are numerous in the extreme and there is no need from the viewpoint of the National revenue to resort to laws which operate as traps or pitfalls to catch the unwary and require the gift of prophecy on the part of taxpayers in determining the basis for their tax.

CONCLUSION.

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

ANDREW B. TRUDGIAN,
Couns

Appendix

Revenue Act of 1935, c. 829, 49 Stat. 1014:

SEC. 105. CAPITAL STOCK TAX [as amended by Section 401 of the Revenue Act of 1936, c. 690, 49 Stat. 1648].

(a) For each year ending June 30, beginning with the year ending June 30, 1936, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of \$1 for each \$1,000 of the adjusted declared value of its capital stock.

* * *

(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Maryland. Such return shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector before the expiration of the period for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 6 per centum per annum from the time when the tax became due until paid. All provisions of law

relating to the tax or

making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than sixty days.

(e) Returns required to be filed for the purpose of the tax imposed by this section shall be open to inspection in the same manner, to the same extent, and subject to the same provisions of law, including penalties, as returns made under Title II of the Revenue Act of 1926.

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid in surplus and contributions to capital, (3) its net income, (4) the excess of its income wholly exempt from the taxes imposed by the applicable income tax law over the amount disallowed as a deduction by section 24(a)(5) of the Revenue Act of 1934 or a corresponding provision of a later Revenue Act, and (5) the amount of the dividend deduction allowable for income tax purposes, and minus (A) the value of property distributed in

the distributions of earn-

come; adjustment being made for each income-tax taxable year included in the period from the date as of which the original declared value was declared to the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section. The amount of such adjustment for each such year shall be computed (on the basis of a separate return) according to the income tax law applicable to such year. For any subsequent year ending June 30, the adjusted declared value in the case of a foreign corporation shall be the original declared value adjusted (for the same income-tax taxable years as in the case of a domestic corporation), in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, to reflect increases or decreases in the capital employed in the transaction of its business in the United States.

* * *

SEC. 106. EXCESS-PROFITS TAX [as amended by Section 402 of the Revenue Act of 1936, c. 690, 49 Stat. 1648].

(a) There is hereby imposed upon the net income of every corporation for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 105, an excess-profits tax equal to the sum of the following:

6 per centum of such portion of its net income for such income-tax taxable year as is in excess of 10 per centum and not in excess of 15 per centum of the adjusted declared value;

12 per centum of such portion of its net income for such income-tax taxable year as is in excess of 15 per centum of the adjusted declared value.

—
the
adjusted declared value —

preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year). If the income-tax taxable year in respect of which the tax under this section is imposed is a period of less than 12 months, such adjusted declared value shall be reduced to an amount which bears the same ratio thereto as the number of months in the period bears to 12 months. For the purposes of this section the net income shall be the same as the net income for income tax purposes for the year in respect of which the tax under this section is imposed, computed without the deduction of the tax imposed by this section, but with a credit against net income equal to the credit for dividends received provided in section 26(b) of the Revenue Act of 1936.

(e) All provisions of law (including penalties) applicable in respect of the taxes imposed by Title I of the Revenue Act of 1934, as amended, shall, insofar as not inconsistent with this section, be applicable in respect of the tax imposed by this section, except that the provisions of section 131 of that title shall not be applicable.

* * *

Treasury Regulations 64 (1936 Ed.):

ART. 44. *Original declared value* [as amended by T. D. 4667, XV-2 Cum. Bull. 312, 314].—(a) In its first return a corporation must declare a definite and unqualified value for its capital stock. "First return" means the first capital stock tax return filed by a corporation for its first taxable year under section 105. Extreme care should be exercised in making this original declared value, for the reason that if a return has been filed disclosing a declared value, such value cannot be changed, amended, or corrected, either by the corporation or by the Commissioner. A subsequent return declaring a different

value, even though filed before the expiration of the prescribed period, is therefore not acceptable under the statute. The importance of the original declared value may be seen from the fact that such original declared value forms the basis for the computation of the tax on capital stock in years subsequent to the first taxable year, and constitutes a prime factor in determining the amount of tax imposed on excess profits under section 106 of the Revenue Act of 1935, as amended by section 402 of the Revenue Act of 1936.

* * *

ART. 45. Adjusted declared value.—(a) First taxable year.—The adjusted declared value for the first taxable year is the original declared value.

If a corporation was in existence during the entire taxable year ended June 30, 1936, the adjusted declared value shall be as of the close of its last income-tax taxable year which ended prior to July 1, 1936. If a corporation makes its Federal income tax return on a calendar year basis, the value declared must be as of December 31, 1935. If a corporation makes its income tax return on a fiscal year basis, the value must be declared as of the close of such fiscal year ended prior to July 1, 1936.

* * *

T. D. 4971, 1940-1 Cum. Bull. 236:

5. Article 44 (a) of Regulations 64 (Capital Stock Tax), approved May 6, 1936, as amended by Treasury Decision 4667, approved July 18, 1936, is amended to read as follows:

(a) In its first return a corporation must declare a definite and unqualified value for its capital stock. Extreme care should be exercised in making this original declared value, for the reason that if a return

has been filed disclosing a declared value, such value cannot be changed, amended, or corrected, either by the corporation or by the Commissioner after the expiration of the statutory period (or any extension thereof) within which the return is required to be filed. The importance of the original declared value may be seen from the fact that such original declared value forms the basis for the computation of the tax on capital stock in years subsequent to the first taxable year, and constitutes a prime factor in determining the amount of tax imposed on excess profits under section 106 of the Revenue Act of 1935.





SUPREME COURT OF THE UNITED STATES.

No. 248.—OCTOBER TERM, 1941.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,
vs.
Lerner Stores Corporation (Md.) } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 22, 1941.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

This is a companion case to *Scaife Co. v. Commissioner*, No. 57, decided this day. The tax in dispute is respondent's excess profits tax for the fiscal year 1937. Respondent filed a timely capital stock tax return for the first year ended June 30, 1936, in which the declared value of its capital stock was stated to be \$25,000. This return was filed September 27, 1936, an extension of time until September 29, 1936 having been obtained. The figure of \$25,000 was erroneous due to a mistake made by an employee of respondent. When the error was discovered an amended return was tendered in which the declared value of the capital stock was given as \$2,500,000. This was on January 27, 1937, more than sixty days after the statutory due date. The amount of the tax, penalty and interest on the higher amount was tendered. The amended return was not accepted and the amount of the remittance was refunded. Petitioner, in determining respondent's net income subject to the excess profits tax for the fiscal year ended January 31, 1937, used the declared value of \$25,000 appearing in the original return. The order of the Board of Tax Appeals sustaining the Commissioner was reversed by the Circuit Court of Appeals. 118 F. 2d 455.

On the issue of timeliness of the amended return the decision in the *Scaife* case is determinative. The case for disallowance of the amendment is even stronger here, for the amended return was filed beyond the period for which any extension could have been granted by the Commissioner. The hardship resulting from the misplaced decimal point is plain. But Congress not the courts is the source of relief.

Respondent in its brief tenders another issue. It contends here, as it did before the Board and the Circuit Court of Appeals, that §§ 105 and 106 of the Revenue Act of 1935 constitute an unlawful delegation of legislative authority contrary to Art. 1, Sec. 8 of the Constitution, that they violate the Fifth Amendment; and that the capital stock and excess profits taxes being "based on guesses and wagers" are beyond the delegated powers of Congress. The Board and the Circuit Court of Appeals ruled adversely to respondent on these constitutional issues. Respondent filed no cross-petition for certiorari. Yet a respondent, without filing a cross-petition, may urge in support of the judgment under review grounds rejected by the court below. *Langnes v. Green*, 282 U. S. 531, 538-539; *Public Service Commission v. Havemeyer*, 296 U. S. 506, 509; *McGoldrick v. Compagnie Generale Transatlantique*, 309 U. S. 430, 434.

The constitutional issues however are without substance. As we noted in *Haggar Co. v. Helvering*, 308 U. S. 389, 391-392, 394, the capital stock tax and the excess profits tax are closely interrelated. The declared value of the capital stock is the basis of computation of both taxes. The declared value for the first year is the value declared by the corporation in its first return; the declared value for subsequent years¹ is the original declared value as changed by certain specified capital adjustments. Sec. 105(f), Revenue Act of 1935, 49 Stat. 1014, 1018. The taxpayer is free to declare any value of the capital stock for the first year which it may choose. While a low declaration of value decreases the amount of the capital stock tax, it increases the risk of a high excess profits tax. On the other hand, a high declaration of value while decreasing the tax on excess profits, increases the capital stock tax. By allowing the taxpayer "to fix for itself the amount of the taxable base" for purposes of computation of these taxes, Congress "avoided the necessity of prescribing a formula for arriving at the actual value of capital—" a problem "which had been found productive of much litigation under earlier taxing acts". *Haggar Co. v. Helvering*, *supra*, p. 394. See 1 Bonbright, *Valuation of Property*, pp. 577-594.

¹ There is no limitation of time on the use of the original declared value under the 1935 Act. It should be noted, however, that § 1202 of the Internal Revenue Code (see § 601(f) of the Revenue Act of 1938, 52 Stat. 447, 566) provides that the "adjusted declared value shall be determined with respect to three-year periods beginning with the year ending June 30, 1938, and each third year thereafter." That adjusted declared value enters into the computation of the excess profits tax under §§ 600 and 601 of the Internal Revenue Code.

"At the same time it guarded against loss of revenue to the Government through understatements of capital" by providing a formula which would in such circumstances result in an increase in the excess profits tax. *Haggar Co. v. Helvering, supra*, p. 394.

There is present no unlawful delegation of power. Congress has prescribed the method by which the taxes are to be computed. The taxpayer here is given a choice as to value. While the decision which it makes has a pronounced effect upon its tax liability, that is not uncommon in the tax field. Congress has fixed the criteria in light of which the choice is to be made. The election which the taxpayer makes cannot affect anyone but itself.

The contention that these provisions of the Act run afoul of the Fifth Amendment is likewise without merit. A claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment which contains no equal protection clause. *La Belle Iron Works v. United States*, 256 U. S. 377; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 401. The propriety or wisdom of a tax on profits computed in reference to a specified criterion of value of capital stock is not open to challenge in the courts. *La Belle Iron Works v. United States, supra*, p. 393. That being true there is no constitutional reason why Congress may not because of administrative convenience alone (*Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 511 and cases cited) avoid litigious valuation problems and rely on the self-interest of taxpayers to place a fair valuation on their capital stock. As was stated in *Rochester Gas & Electric Corp. v. McGowan*, 115 F. 2d 953, 955, "To say that Congress could not choose a scheme implemented by such mild sanctions, as an alternative to actually computing an 'excess profits tax' with all the uncertainty and litigation which that had involved, would be most unreasonably to circumscribe its powers to establish a convenient and flexible fiscal system."

Nor do we have here any lack of that territorial uniformity which is required by Art. 1, § 8 of the Constitution. *La Belle Iron Works v. United States, supra*, p. 392.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.